CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1819.

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POEYFARRE vs. DELOR.

POEYFARRE vs. *DELOR.*

APPEAL from the court of the parish and city of New-Orleans.

After the defendant has appealed, and the judgment has thereon been affirmed, the plaintiff may still appeal and have any error to his disadvantage in the judgment corrected.

DERBIGNY, J. delivered the opinion of the court. This case was already before this court upon an appeal claimed on the part of the defendant, and the judgment of the inferior court was affirmed. It is now brought up by the plaintiff, and the question arises whether a case already adjudicated upon, on the appeal of one of the parties, can again be enquired into, on an appeal by the other. 6 *Martin*, 10.

To decide this question, the ancient laws of the country afford little assistance; for, as the

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delay for appealing was by them limited to five days, if both parties appealed, both complaints were before the appellate court at the same time, and the whole could be disposed of with a full consideration of the respective productions of the suitors. The act of 1813, organizing this court, has altered that mode of proceeding by granting two years to claim an appeal, and under it arises the present difficulty.

The general principle, which regulates the jurisdiction of courts of appeals, is that they have cognizance only of the subject matter of the appeal. The party, dissatisfied with the judgment of the inferior court, prays for redress either against the whole judgment, or against such part of it as he conceives to be injurious to his rights. If he complains of the judgment only in part, the jurisdiction of the appellate court extends no further.—It is laid down in the *Curia Phil. part* 5. §. 1, *n.* 22, that the appeal claimed by one party avails the other *en lo appelado*, that is to say, that the subject matter of the appeal, may be revised and corrected, not only in favor of the appellant, but even in favor of the appellee. If, therefore, after an adjudication of the court of appeals upon that subject, the appellee should, in his turn, attempt to bring the same matter before them, it would be

just to consider the judgment as conclusive against him. But if the appellee chooses to appeal from some part of the judgment, which was not submitted to the apellate court by his adversary, it appears to us that he has a right to be heard: for it is in fact a new subject, and, with respect to to the jurisdiction of the court of appeals, a new case.

In this particular instance, it is true that an appeal has been claimed by the defendant generally. The question under that appeal was whether a contract of sale of the house of the defendant was valid and binding, and the court decided that it was. But a part of the plaintiff's demand, to wit, the damages which he claimed, was not taken notice of in the judgment of the inferior court, and consequently, made no part of the subject submitted to the court of appeals. The plaintiff has therefore a right yet to pray for a decision of this court upon that separate point.

The damages here claimed are the rent of the house, since the day on which delivery ought to have been made, until possession was given. The monthly rent which the house yielded, when let, was one hundred dollars. We think it just that the seller should account to the purchaser for that rent, since the day on which a tender

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of the price of purchase was made, until the date of the judgment of this court on the first appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court, confirmed by the former decision of this court, be so far corrected as to embrace the rent of the house sold by the defendant to the plaintiff, from the 29th day of July, 1818, to the 18th of January following, at the rate of one hundred dollars per month; and that accordingly the plaintiff do further recover from the defendant the sum of five hundred and sixty six dollars, with costs.

Duncan for the plaintiff, *Livingston* for the defendant.

CLAIBORNE vs. *POLICE JURY.*

A court cannot compel the police jury to comply with the directions of an act of the legislature, in laying a tax.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. On motion, made in the court of the first district on behalf of the representatives of the late William C. C. Claiborne, that court issued an order for the police jury of New-Orleans to shew cause, within three days, why they should not be compelled to lay a tax on the parish,

conformably to the provisions of an act entitled, "An act for the relief of the widow and heirs of the late Governor Claiborne" and that rule having been made absolute, an appeal was claimed therefrom, and brought up by consent of parties.

The order of the district court is resisted on two grounds: 1. Because the courts of justice have no jurisdiction over a legislative body to compel them to fulfil their legislative functions; and 2. Because the law, ordering the police jury to lay this tax, is unconstitutional.

The first fundamental principle of our constitution is, that the powers of the government are divided into three departments, ever to be kept distinct, to wit. the legislative, the executive and the judiciary.

To the legislative branch of the government belongs the right of laying taxes for purposes of general utility. Supposing the present tax to be one, which the legislature had a right to create, the law, by which they have ordered the police jury to impose it, is a delegation of their powers. To obey that law the jury must legislate—they must themselves enact a law providing what sort of tax it shall be, on what property it

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shall be laid, in what manner it shall be levied, how it shall be enforced. Is it the province of the judiciary to direct how they shall do all this? And, if they can give such directions, how are they to compel a compliance? Suppose the jury enact a law, without providing for its execution, will courts again interfere? As well might they legislate themselves. But the better to test the impropriety of such interference, how and against whom is this supposed authority to be exercised? The police jury, though authorized by law to represent the parish in courts of justice, is not a corporation possessed of property; therefore, no *distringas* can issue to compel a performance. One of their adverse counsel found no difficulty in the matter—he thought it very simple to send them all to jail. This mode is, no doubt, expeditious; but the question is, whether it is legal and proper.

In a deliberative body, the majority rules the minority. Suppose in this assemblage of twelve citizens, five were willing to lay the tax, and seven were dissenting; are they all to be imprisoned as refractory, or is the court to discriminate between them? The last seems to be the only step consonant with justice; but how is the court to know who is disobedient, and who is not? In this particular case, there was

something said about unanimity; but the knowledge of this fact is accidental. The question is, whether the court can compel a disclosure of the yeas and nays, and then pick out the refractory members to send them to jail; or whether, without taking any such trouble, it can at once through them all into prison, until a majority can be compelled to legislate. We think that it can do neither.

A majority of the court (MARTIN, J. dissenting) being of opinion that the imposition of the tax, required to be made by the police jury in the present case, would be an act purely legislative; it is deemed unnecessary to examine into the constitutionality of the law, by which the legislature have undertaken to delegate to them power to legislate in this particular instance.

It does not belong to the courts ot judicature to interfere in legislative concerns, in such a manner as to order laws to be passed, or perfected, either by the legislature itself or any body politic to which it may have delegated legislative power, admitting its competency, to authorize others to legislate in any case.

It is, therefore, ordered, adjuged and decreed, that the judgment of the district court be annul-

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led, avoided and reversed, and that judgment be ordered for the defendants, with costs.

Duncan for the plaintiff, *Moreau* for the defendants.

POLICE JURY vs. *M'DONOGH.*

A police jury may sue for money expended in paying for work done on a delinquent planter's levee.

The members of it may be witnesses.

The proceedings of the jury may be recorded in French.

When works are especially ordered, the visit of the parish judge is not essential.

A law is not unconstitutional which provides a means of recovery for debts due before its passage.

APPEAL from the court of the parish and city of New-Orleans.

The plaintiffs claimed from the defendant four thousand and odd dollars, paid out of the parish treasury to planters ordered to work on his levee, in the year 1815. There was judgment against him, and he appealed.

Turner, for the defendant. The plaintiffs were not authorized to sue, as a corporation, till the act of the 22d of February, 1817, upwards of two years after the cause of action in the present case occurred. The law cannot have a retrospective effect: it may authorize them to sue, whenever the cause of action is posterior thereto. A claim which could not be enforced by a suit, is not a legal claim, and the situation of the debtor cannot become harder, without any act of his. The parish court therefore erred in sanctioning the suit.

The records of the proceedings of the police jury, being kept in the French language, cannot have any effect in a court or out of it. If the general assembly had, in that language, enacted those regulations, binding on the defendant, he could not have been compelled to have yielded obedience to them. *Const. art.* 6. *sect.* 15. *Nemo plus jus dare potest quam ipse habet.*

The police jury cannot have any power but that which they derive from the legislature who created it, and how could the legislature grant to them the power of doing what they could not themselves do. Members of the police jury were also improperly admitted as witnesses.

The regulations relied on were not enacted by a competent authority. The jury was not then duly organized; for one third of the justices of the peace commissioned in the parish were not present, as required by the act of the 25 of March, 1813. Out of twelve justices commissioned in the parish, only three were present.

It is provided by the act of April 6, 1807, that, if the parish judge, going in company with two inhabitants to examine whether the works ordered have been performed, find any part of them not done, he shall order the delinquent to complete it within a given time, and if this be not done, the judge shall pro-

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cure it to be completed, at the delinquent's expence, paying therefore at the rate of one dollar for each day's work for the slaves employed. 2 *Martin's Digest*, 588, *n.* 2. In the present case there was no examination, no inspection by the judge—no time fixed by him, at the expiration of which only, the slaves of neighbouring planters might have been placed on the levee to complete the work, at one dollar per day. Here the price fixed by law was disregarded, and the jury arbitrarily paid and expect to recover from the defendant at the rate of three dollars per cubic toise, while it is in evidence that a negro may complete this toise in a day. The defendant, if he be liable to pay any thing is answerable only at the rate fixed by law, and the plaintiffs have no right to resort to a *quantum meruerunt.*

Lastly, it is in evidence that the work for which payment is claimed was unnecessary.

Moreau, for the plaintiffs. That law could not be said to be intended to have a retrospective effect by which a corporation, a minor or any other individual incapable of acting for himself, would be provided with a person to stand in court for the protection of rights which could not otherwise be defended. This would

make no change in the nature of the right or of the obligation. Before the territorial act for the incorporation of the city of New Orleans the actions instituted for the protection of the municipal rights of its inhabitants were not brought in the name of a mayor, aldermen, &c. A mucipality and before that a cabildo represented the inhabitants. Now can it be pretended that the new administrators cannot prosecute in cases in which the cause of action accrued before their creation. And what difference can there be between providing a corporation with new officers or giving them such officers, when it is not provided with any? Was it ever pretended that a tutor could not prosecute the debtors of his minor, because before his appointment they could not be effectually sued, as, in the language of the counsel for the defendant, a claim, which cannot be enforced by a suit, is not a legal claim?

It is true the constitution of the state requires that all laws that may be passed by the *legislature*, the public records *of the state* and the judicial and legislative written proceedings *of the same* be promulgated, preserved and conducted in the language in which the constitution of the U. S. is written. But, are the minutes of the police jury of a parish, those of the corporation of

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a town, the regulations of an hospital or a bank, even when by-laws are enacted, *legislative proceedings* of the state? Are the members, who enact such by-laws, THE LEGISLATURE? Certainly not.

The interest of an inhabitant of a parish or a city in the affairs of the corporation is so very minute, and it so generally happens that evidence necessary to the support of corporate rights is in the possession only of the members of such a corporation, that the law has provided that such an interest should not exclude their testimony. 3 *Martin's Digest*, 482, *n.* 5.

It is true the act of 1813, *c.* 4, § 14, requires the presence of one third of the justices of the peace commissioned in the parish, and a majority of the jury, in order to constitute a *quorum*, and the defendant's counsel urges that there were only three justices present, who consequently did not form a third of the whole number. It is admitted, that if we reckon the justices of the city of New Orleans, as part of those of the parish, there were present only one fourth of the latter, there being one justice in each of the four districts of the parish and eight for the city, in all twelve; so that the three justices present constituted only one fourth of the whole, when the regulation or order on which the present

action is grounded was adopted. But, in the city of New Orleans, the justices appointed in each of the eight sections in which the city is divided has, *by the tenor of his commission, the title of a justice of the peace of the 1st. 2d or 3d section of the city of New Orleans, as the case may be.* 2 *Martin's Digest*, 540, *n.* 20. And the authority of the police jury of the parish of Orleans does not extend to the city of New Orleans, in which the corporation exercises the functions of the police jury. *Ib.* 294, *art.* 9. Accordingly the justices of the county alone attend the meeting of the police jury and those of the city are never present to it.

The defendant's counsel further contends that the police jury could not by their regulations alter the forms prescribed by the legislature, or the rate which it has fixed.

It is true that the act of 1807 provides that at the expiration of the time fixed by law for the termination of the works, it shall be the duty of the judge to go, in company of two inhabitants, to examine the said works, in order to satisfy himself that they are executed in the manner prescribed by the regulations, and any inhabitant, who shall have failed to execute the same, shall forfeit and pay the fine fixed by the regulations, and the judge shall order him to

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execute his said work within a certain time, after which, if the said inhabitant has again neglected to make it, the judge shall order the work to be made at his, the delinquent's expenses, either by the job, or by the inhabitants of the parish, each of whom shall send to the spot a number of able bodied negroes, proportioned to the strength of his gang, for the hire of which negroes they shall receive one dollar per day. 2 *id.* 588, *n.* 2. The 10th article of the regulations of the police jury of July 6, 1815, directs that the syndics, assisted at least by two planters of the neighbourhood, will order the works to be done to the existing levees.

There is no contradiction between these two dispositions. The inspection, which the judge is directed to make by the act of 1807, is only to take place after the period within which the works on the levees are to be completed, which ought not to prevent the jury from taking proper measures as to the manner in which these works are to be ordered or executed.

Farther, the legislature speaks of ordinary reparations or works to be done on levees. The 11th article of the regulations of July 8, 1815, requires the works to begin in July and be completed in November following. The exami-

nation of the judge after that time ought not to prevent the jury to direct in what manner, even this ordinary work is to be performed, or ordered by the syndics. As to extraordinary works the legislature has vested the jury with an unlimited power.—1807. *c.*

The jury were likewise well authorized to allow for this extraordinary work, at the rate of three dollars per cubic toise. The act of the legislature cited relates only to ordinary repairs to the levee. In extraordinary, where a *crevasse* threatens the inundation of a whole neighborhood, the impending danger cannot be averted by ordinary means, and the risk of being carried away or of receiving material injury may prevent negroes from being obtained at the ordinary price.

Lastly, the defendant contends he is not liable, because the works performed on his levee were ordered by the jury without any necessity. He supports this part of his defence by the testimony of his own overseer and two of his neighbours. Our only answer to this is that, the law has constituted the police jury legal judges of the necessity of a work of this kind.

Mathews, J. delivered the opinion of the court. The police jury brought this action, in

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their corporate capacity, to recover from the defendant, the sum of 4899 dollars, paid by them to several inhabitants of the parish, for work and labour done in making a levee on the land of the defendant, who resists their claim on every ground that could be imagined, in a laborious and ingenious defence.

The answer contains a peremptory exception to the sufficiency of the petition, in law, to authorize a recovery and a general denial.

During the trial of the cause, in the parish court, eight bills of exceptions were taken by the defendant's counsel and must be disposed of before a discussion on the merits.

The first is to the introduction of any testimony, on the cause of action set forth in the petition. This is nothing more than a repetition of the exception in the answer, which was attempted to be supported on two grounds: that the police jury have no right to sue *eo nomine*, as a corporation and that, by their own shewing, they have not pursued the course prescribed by the law by which they were created and under which they now act.

The acts of the legislature of 1807 and 1813 have created political bodies to direct and manage the police of their respective parishes, un-

der the name of police juries: and, it is a principle of law that, when a corporation is formed and named by a competent authority, it acquires certain rights and powers, capacities and incapacities, among which is that of suing and being sued by its corporate name. *Civ. Code*, 88, *art.* 6. 1 *Black.* 474. If the creation and name given to a corporation are circumstances in themselves sufficient to confer on it the capacity of suing and being sued, there can be no necessity for any express enactment to this effect. But, there is an act of assembly of 1817, by which police juries are authorized to sue in cases like the present, and, although passed long since the performance of the work, for which a remuneration is claimed, in the present action, it is not, in our opinion, unconstitutional, as being *ex post facto*, or impairing the obligation of a contract. It creates no new penalty for an act or offence previously committed. So far from having a tendency to impair any obligation, arising from a contract or quasi contract of the parties, it is declaratory of the means by which it may be enforced. The capacity of the plaintiffs to sue, in their corporate name, is thus far clear and evident. Their right to recover on the cause of action, as set forth in the peti-

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tion, depends on the powers which they possess to act for the individuals of their parishes, found in circumstances like those in which the defendant is stated to have been, as the time the work and labour was performed for him by their order.

It is agreed that police juries derive all their powers and authority from the acts of the legislature above cited, and that these are to be taken and considered as one act, so far as the provisions of the first are not inconsistent with those of the latter. Both acts grant to police juries power, in the most general terms, to make regulations relative to roads and levees according as circumstances may require, and, in some instances, the judge of the parish has the right of ordering a levee to be made, at the expense of an inhabitant, who fails to comply with the regulations of the police jury.

The petition states that the defendant was required to complete his levee, within a limited time, which he had been ordered to make under a regulation of the police jury—that he was unable or unwilling to perform the work required of him, and the parish judge ordered it to be done, at his expense, which was accordingly carried into complete execution and paid out of the parish treasury—&c. It is believed that

the petition sets forth a good cause of action, and evidence ought to have been received in support of the allegations therein, and consequently that the parish court was correct in overruling the defendant's objection to any evidence in support of the action.

The seven remaining bills of exceptions are to the admissibility of certain witnesses, on the score of incompetency and of written evidence offered by the plaintiffs. The objection to the witnesses, on the score of their being members of the corporation, must be repelled, according to the act of the territorial legislature of the 26th of March 1806, 3 *Martin's Digest*, 482, *n.* 5.

The objection made to the admission in evidence of the minutes of the deliberations of the police jury, on account of their being in the French language ought not to be sustained. They are not of that class of proceedings required by the constitution to be in English.

Taking the whole of these exceptions together we do not discover in the opinion of the parish court, any error requiring that the cause be remanded, and we will proceed to investigate it on its merits.

In doing this, it is necessary to recur to what has been already noticed, in part, in treating of

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the first bill of exceptions, in regard to the powers granted by law to police juries. They have a general power to direct the making of levees, in their respective parishes, and as to their structure and the time within which the planters may be required to perform the works ordered thereon. It is a power which ought to be discreetly used: but to give a full effect to it, whenever an inhabitant is unable or unwilling to complete a levee, required to be made by him, according to the dimensions and within the time prescribed, and the whole neighborhood is exposed to injury by his inability or perverseness, it has been thought proper by the legislature to grant power to the parish judge to order it to be made at the expense of the delinquent.

In the present case, the appellee was required to make his levee, the necessity and extent of which was determined by the police jury. He failed to do it, and the work was completed by the slaves of the neighboring planters, in obedience to the order of the parish judge, and they were paid out of the parish treasury. But it is said that, these things were done without proper authority, because it does not appear that the jury, who made the regulations relative to the levee of the parish in general, and particularly in relation to that of the defendant, were con-

stituted as the law requires, and therefore all these acts are void, and because the judge did not visit the levee of the defendant as he was required to do by the act of 1817, 2 *Martin's Digest*, 588, *n.* 2, before he ordered the work to be done at his expenses. The police jury must be presumed to be legally organized when they acted, unless the contrary be shewn, which in the present case, it is believed has not been done. The list of the justices of the peace, produced by the appellee, from the registry of the executive, does not contradict the presumption that a sufficient number, of those who were distinctly of the parish, were present at the enactment of the regulations relied on by the plaintiffs in the present case. The visits of the parish judge, before ordering the making and completion of levees, at the charge of individuals, can only be inferred as means of obtaining correct information when the works have been ordered by the general regulations of the police jury. In the present case, the jury have by *special* regulations required the work to be completed by the appellee, and on his failure, the neighboring inhabitants were compelled to perform it, and have been paid by the parish to whom the amount ought to be refunded, according to the just value of the work performed.

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What this value may be is the only question which remains to be examined.

The work was paid for at the rate of three dollars per cubic toise. The act last cited allows to the inhabitants one dollar per day for the labour of their slaves, when compelled to work as in the present case: we are of opinion that this provision of the law ought substantially to be carried into effect. The evidence is various and contradictory, as to the time which would be requisite for a good labourer to complete a cubic toise of levee. Some of the witnesses say that it would require three days and others only one. The truth most probably would give a medium portion of time—two days for each toise, which we think proper to adopt, in fixing the amount of the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed: and proceeding to give such a judgment as in our opinion ought to have been given, it is further ordered, adjudged and decreed, that the plaintiffs and appellants recover from the defendant and appellee the sum of two thousand, seven hundred and fifty-two dollars, with costs in both courts.

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PORTER & AL. vs. LIDDLE.

APPEAL from the court of the first district.

A bidder may refuse taking land struck to him, on discovery of an incumbrance and the auctioneer's proclamation, before the bids began, is no evidence of the bidder's knowledge of the incumbrance.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants instituted this suit to compel the defendant and appellee to comply with his obligation as purchaser of a lot of ground, sold by order of the court of probates.

Their right to recover, as their counsel admits, depends entirely on a question of fact, viz. whether the defendant knew, at the time he was bidding on the lot, that it was encumbered with a lease.

There is nothing to be found in the evidence that may shew with certainty that he had knowledge of the lease, nor does it appear that all the necessary steps were taken by the plaintiffs to communicate that fact to the public, in such a manner as to raise a legal presumption that the defendant could not well be ignorant of it—no mention was made of this in advertising the sale. The only evidence of any attempt to give publicity to the circumstance is the declaration or proclamation of the auctioneer, at the time of sale, which, in our opinion, is not sufficient to charge the buyer, unless it should be made further to appear that this proclamation was utter-

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ed, under such circumstances, that the bidder could not fail to hear it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Porter for the plaintiffs, *Duncan* for the defendant.

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On the failure of a debtor, his note though not yet payable may be put in suit.

Till there be a stay of proceedings any creditor may sue or attach.

If goods be assigned, proof of tradition is necessary.

APPEAL from the court of the first district.

Porter, for the plaintiff. On the 14th of October, 1818, the plaintiff instituted a suit by attachment against the defendant for 3596 dollars, 31 cents, and seized his property in the hands of T. Howe, under a writ issued out of the parish court, and on the next day he instituted another suit, in the district court, on which an attachment was issued and levied in the hands of the same person. The first suit was afterwards transferred to the district court, by consent of the parties; both suits having been consolidated there was judgment for the plantiff, and the cause is now before this court on a bill of exceptions and a statement of facts.

The bill is taken to the opinion of the dis-

trict court in overruling the motion of the defendant's counsel to set aside the suit originating in the district court, on the ground that, from the plaintiff's own shewing, the debt was not payable at the time the attachment issued.

As the petition alledged the bankruptcy of the defendant, this circumstance suffices to give the right to sue immediately. *M'Bride* vs. *Cocherons*, 5 *Martin*, 276.

If the petition sets forth a case which authorizes an attachment, this court cannot enquire into the proof exhibited to the judge or clerk of the court from which the attachment issues. 1 *Martin's Digest*, 512 *n.* 6 & 516 *n.* 2.

If the court should think that they have a right to enquire into the evidence on which the attachment issued, the depositions and documents annexed to the petition abundantly prove the failure of the defendant, previous to the issuing the attachment in both cases. The bill of exceptions can only be considered as applying to the case originating in the district court, as it was taken before the transfer of the other case.

On the merits, the case is so fully with us, that we need only to refer the court to the statement of facts.

Hennen, for the defendant. Our attachment

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law provides for two cases, where the debt is due at the time of issuing the writ, *acts of* 1817, *page* 26, § 2, and the other where the debt is not yet due. *Ib.* 9.

The plaintiff wishes to bring himself within the provisions of the second section, although the notes had not arrived at maturity, by endeavouring to prove the failure of the defendant.

The proof offered, we contend, does not establish the fact of insolvency, bankruptcy or failure of the defendant. No evidence has been given of the protest of his notes, nor of any legal proceeding in the state of Massachusetts which justifies the plaintiff's allegation. The plaintiff must prove that the defendant has done some act which, by the laws of Massachusetts, his place of residence and domicil, amounts to a bankruptcy. That has not been done. He does not pretend to bring himself within the provisions of the third section of the act of 1817, which was the only one that could authorise an attachment, in this case. If, however, the court should be of opinion that the defendant has become insolvent, has failed and become bankrupt, would an attaching creditor in such a case have a privilege over the others? Does not the plaintiff by his own shewing declare that he wishes to take advantage of the other creditors? *Coop-*

er's Bankrupt Laws, Appendix, xxvii. The plaintiff moreover shews by the assignment, which he has given in evidence, and which forms a part of the statement of facts, that the defendant has no right in the property attached. The court must presume every thing against the plaintiff and in favor of the defendant, and will therefore presume, as the contrary does not appear, that a delivery has been made under the assignment previous to the attachment.

Under all the considerations of the case we trust the court will dismiss the attachment or render judgment in favour of the defendant.

Porter, in reply. We not only rely on the third section of the act of 1817, referred to by the defendant's counsel, but we contend that the petition sets forth a case which authorizes an attachment—under the second, because the debt sued for, although not yet payable, according to the terms of the contract, had become so by the insolvency of the debtor: the rule being that on his insolvency all debts become payable presently, although by the terms of the contract they be only so *in futuro*. The insolvency of the defendant is alledged in the petition and the affidavit which the law requires is annexed thereto. The rule of which we claim the ben-

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fit is found in our statute book, *Civ. Code*, 276, *art.* 88, and this court acted on it in the case of *M'Bride* vs. *Crocherons*, which has already been cited.

It is contended that sufficient proof of the insolvency of the defendant was not offered to authorize the issuing of the attachment. The proof, required by the act of 1817, already cited, is the affidavit of the plaintiff, his agent or attorney. This was furnished and if it be not deemed sufficient, it is believed that the depositions and documents annexed to the record will place the question out of doubt.

It is said that the property attached had been assigned by the defendant, before the attachment. Admmitting this allegation to be proved and that the property is identified, still the defendant must fail; for the assignee, as the property was not delivered here, had only an inchoate right. So, this court decided in the case of *Norris* vs. *Mumford*. 4 *Martin*, 20.

If the defendant's insolvency did not exist, he might have disproved our allegation of it. This he did not attempt.

MARTIN, J. delivered the opinion of the court. Suits were brought by attachment on two notes of the defendant, before the arrival of the day on which they were made payable. The suits

being brought on different days, were consolidated. Before the trial, the defendant prayed that the attachment on one of the suits might be dismissed, the affidavit and petition not shewing a sufficient cause. The court overruled the motion and he took his bill of exceptions. There was afterwards a judgment for the plaintiff and the defendant appealed.

The affidavit establishes the debt and the residence of the defendant out of the state, and the petition avers his failure.

His counsel contends that the attachment ought to have been dismissed, as no evidence was given of the protest of any of the defendant's notes or any legal proceedings or any act of bankruptcy.

We are of opinion that the district court did not err. The petition averred the failure of the defendant, and this under our statute authorized the suit. *Civ. Code*, 276, *art.* 88. The affidavit established the only two facts which the law requires—the existence of the debt and the residence out of the state of the defendant.

On the merits, the execution of the note is admitted by the statement of facts, and the depositions which come up with the record establish the failure of the defendant.

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FISK vs. CHANDLER.

But the defendant's counsel contends that one of the creditors of an insolvent has no privilege and cannot attach his property, which must remain liable to the claims of all generally. As long as proceedings at law against a debtor's person and property have not been stayed, any of his creditors may resort to either for the payment or security of his debt. Whether he does attach or receive goods or money for the joint benefit of all, or to his own private use, is a question useless to be discussed in the present case.

The defendant's counsel further contends that the property attached, though once the debtor's, has ceased to be his by assignment, which the court must presume to have been followed by delivery, although none be proved. If no delivery be proven the consequence is the same as in all other cases. *De non apparentibus et non existentibus eadem est lex.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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WILLIAMSON & AL. SYNDICS vs. SMOOT & AL.

Corporations of other states may sue in this state

The creditors of a stockholder cannot seize his share in any specific part of the property of the corporation.

WILLIAMSON & AL. SYNDICS vs. *SMOOT & AL.*

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiffs having caused an attachment to be levied on the steam boat Alabama, the St. Stephens steam boat company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are 1. Is it proper for our courts of justice to recognise, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?

I. The propriety or legality of one sovereign state acknowledging, and favouring the rights and privileges of political bodies of another state, are opposed on the ground of their being in violation of the sovereignty of that which recognizes the acts of incorporation of the other, and to the prejudice of the rights of its citizens.

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It does not appear to this court that these things will of necessity result, in every case, from such acknowledgment and recognition. When attempts directly opposed to the sovereign power of a state and the rights of its citizens are made by the political bodies of another, they certainly ought to be repelled, and so ought such, if made by corporations deriving their existence from the government, under which they act. But as the present claim of the St. Stephens steam boat company is not of this nature, we are of opinion that they ought to be allowed to prosecute it in their corporate capacity.

II. The existence of the claimants being recognised as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. *Civ. Code*, 88, *art.* 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

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It is therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steam boat the Alabama, and that she be released therefrom.

Livingston for the plaintiffs, *Duncan* for the claimants.

ANDRY & AL. vs. *FOY.*

Former judgment confirmed.

In this case, the court pronounced judgment, at June term. *See the preceding volume.*

Mazureau, on an application for a re-hearing. The first question to be decided between the parties was: Is the defendant by the manner in which the sale was made, under the circumstances disclosed by the testimony and after the plaintiffs' own allegations, bound to warrant the redhibitory vices?

The court in examining this question lay it down as a principle of law, susceptible of no exception, that the vendor must be ignorant of the existence of the vice or disclose it to the vendee, to exclude the warranty, and hold that "in the present case, it is clear that the dispo-

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ANDRY & AL. vs. FOX.

sition of the slaves sold, to run away, was known to the vendor and he did not disclose it."

On this decision we beg leave to represent, that whenever the vendee, at the time of the sale, knew or had it in his power to know, with facility, the vice or defect complained of, the law excludes the warranty.

This exception is founded upon the rule: "*Damnum quod quis suâ culpâ sentit, non videtur sentire.*" The only object of the law being to prevent the vendee from being deceived by the vendor. "*Ne emptor decipiatur,*" says the Roman law. *ff.* 21, 1, 1, § 6.

No se puede pedir la redhibitoria sabiendo el comprador el vicio de la cosa que compro al tiempo de la venta, o siendo apparente en ella, aunque el vendedor no se le diga. Curia Phil. 1, 13; §. 29. Pothier teaches the same doctrine, and says that vices, which may be easily *(facilement)* known, cannot be the foundation of redhibitory action. In such a case, says he, *l'acheteur est presumé en avoir eu connaissance et avoir bien voulu acheter la chose avec ce vice, & par consequent n'avoir souffert aucun tort; nam volenti non fit injuria. Et quand même il ne l'aurait pas connue, il ne serait pas recevable à se plaindre du tort qu'il souffre de ce contrat &c. Contrat de Vente, n.* 207, 208.

This doctrine is perfectly applicable to the present case: a careful examination of the proceedings and of the evidence will demonstrate that it depended entirely on the vendees to know the vice complained of. 2. The plaintiffs cannot have been ignorant of the vice. The vendor in his bill of sale recited the different deeds by virtue of which he was possessed of the slaves; the names of the persons who had sold them to him; the dates of the deeds; the names of the different notaries public, in whose offices they had been passed, &c. and in some of those deeds, the vice complained of is mentioned as to three of the slaves.

The vendees, in their petition, have alledged and stated that "prior to the sale made to them, that is, when the vendor purchased the slaves, they were *notoriously* bad characters, addicted to every sort of vice or defect and in the habit of *running away*."

Such facts being known, if the exception contained in the *Curia* and Pothier be correct and well understood, we contend, that the action of the vendees cannot be maintained; for, if the *bad character* of the slaves and their *habit of running away* were matter of *notoriety*, there was no necessity to disclose them; they were, they must have been, *known* to the vendees.

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We say a thing is *notoriously* known to have such a vice or quality, when it is so known to all the people of the place, in which the thing is. Now the plaintiffs are *part of the people* among whom the slaves were. The consequence is that the vices of the slaves were notorious to *them* as *well* as all the rest of the community.

The definition of the word *notorieté*, as found in the *Repertoire de Jurisprudence*, shews the correctness of this argument. *Notorieté: ce mot se dit, en général, de ce qui est connu publiquement. Les jurisconsultes appellent notorieté de fait celle qui est fondée sur une certaine croyance publique.* 42 *Guyot*, 324.

According to this definition we see that the plaintiffs' allegation amounts to this: "Prior to our purchase, it was *publicly known*, it was of *public belief*, in New Orleans, that the slaves, we have bought, were addicted to every sort of vice or defect and *in the habit of running away*," and we would believe that *men* in such situations, cannot be said to have been deceived or be heard.

The second question to be examined was "does the evidence support the action as to all the slaves, for which the court below ordered the sale to be rescinded?"

To decide it a previous knowledge of the law was necessary.

The law says, it is true, that the vice of running away, in slaves, is a redhibitory *vice*, but it also says that the vice consists of *the habit of so running, prior to the sale. Civil Code*, 359, *art.* 76, & 79. *Partida* 5, 5, 64.

Now, I would beg leave to observe that out of the six slaves, which are ordered to be taken back by the vendor in this case, there are *two* who are not proven, by the evidence, to have been in the habit of running away prior to the sale, to wit: *Horace*, about 14 years old, at the time of the sale, who prior to it had, it is said, runaway *once* and *no more* who, since the sale, has never left the vendees' house or plantation. And *Boucaud*, who is proven to have runaway *only twice*, before the sale and that too, in *four years.*

If a gentleman should happen to get *in liquor once* or *twice* in four years, would any person pretend to say that he is in the habit of getting drunk? If not, why should it be said that Horace and Boucaud were, prior to the sale, in the habit of running away?

L'habitude est un penchant acquis par l'exercise des memes actions. Encyclopedie, verbo *Habitude.*

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The judgment says, "The existence of the habit of *running away*, prior to the sale to the plaintiffs, is *sufficiently proven* by the bills of *sale to the vendor*, the deposition of Lamothe and the orders of the mayor," &c.

Upon this point, I pray to remind the court, 1. That the bills of sale to the vendor shew the existence of the vice as to three of the slaves sold, and not as to the six ordered to be retaken by the vendor; and that neither Horace nor Boucaud is in the said deeds of sale, represented as being in the habit of *running away*. 2d. That, from the deposition of Lamothe and the orders of the mayor, nothing appears, as to Horace or Boucaud, except that the latter did *run away twice* in *four* years *prior to the sale.*

The third question was relative to the sum which the vendor was to reimburse to the vendees in case he was bound to warrant the vice of running away.

The court in examining it say, "Both parties complain of the valuation made in the parish court, the vendor thinking it extravagant, the vendees insufficient; perhaps this is the best evidence of its correctness; it does not appear to us so materially incorrect, &c."

This argument might be easily retorted by saying, "The judgment must be very bad since none of the parties is satisfied with it." The circumstance of both parties complaining of the judgment can never, in my humble opinion, be an evidence of its correctness; all that can be presumed from it is that the judge acted with *impartiality*.

At any rate, the question was not whether the *valuation* appeared correct, but whether the judge who made it had the right to make it in the manner it was made: and on this point I beg leave to recall to the mind of the court that I have shewn, that the judge had no right to make any valuation, but was obliged to decree the sum to be reimbursed according to the testimony; and I should think that the will or caprice of men ought not to be substituted to the *sacred will* of the law. *Partida*, 3, 16, 40.

The last question was whether any hire was to be allowed for the slaves for which the sale is rescinded during the time they have been in the possession of the vendees.

The court have decided that no hire can be allowed to the vendor.

On this part of the judgment I beg leave to represent that he is entitled by law to the hire

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of the negroes, in that situation. *Redhibiendose la cosa ha de ser volviendola al vendor, con mas lo que se hubiere deteriorado or diminuido, y sus aumento, accessiones, partes, frutos y reditos, y alquileres, &c. Curia Philipica, 1, 18, n. 37.*

One of the slaves, Horace, ordered to be retaken has constantly been and still is on the vendees' plantation, the five others have been kept by them for nearly three months after the sale and prior to their action.

The vendor must certainly be paid for the services the slaves have rendered to or performed on the vendees' plantation.

Finally it appears, from the sentence of this court, that the judgment of the court below was reversed, as to the interest, on the only ground that, the price to be reimbursed was not fixed between the parties; and that no interest being allowed, no hire can be allowed. But I would observe that had the price been fixed, no interest could have been allowed. Interest is given by law to indemnify the vendee for the use which the vendor has had of the purchase money. Therefore as, in this case, the vendees had not paid the purchase money down, at the time of the sale, but on the contrary had given their note for it, payable one year after, all they

were entitled to was a restoration of their note, and security from the vendor, that at the same period fixed for its payment he would pay them the amount fixed for the price of the particular negroes he was obliged to retake; but no interest was due.

A re-hearing was granted on the second point only. The plaintiffs' counsel offered no new argument and the defendant's relied on those urged above.

MARTIN, J. delivered the opinion of the court. At the request of the defendant, a rehearing has been had, in this case, on the question whether Horace and Boucaud, two of the slaves sold by the defendant to the plaintiffs, were really in the habit of running away, at the time of the sale, so as to entitle the plaintiffs to their redhibitory action.

The fact was found, against the defendant, by the jury, in the parish court, and although this circumstance is not conclusive on the appeal, it cannot fail to have some weight.

Horace was purchased by the defendant in March 1818, and his vendor then expressly excluded the legal warranty against such vices, which the law considers as redhibitory ones,

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viz. capital crimes, robbery and the habit of running away. This appears by the bill of sale on record: and the very vendor did declare that Horace ran away from him, and was absent seven consecutive months, during which he went to New York, Liverpool and Charleston, where he was arrested and brought to New Orleans, where five weeks after he sold him to the present defendant, informing him he was a runaway and was sold as such.

It is in evidence that Boucaud was brought to jail as a runaway, before the sale to the plaintiff, and that he has since run away twice. In the sale of Boucaud to the defendant, the vendor warrants only against the *maladies* for which the law grants a redhibitory action.

The counsel for the defendant thinks the jury and this court erred in inferring from this testimony that the slaves were in the *habit* of running away—that one single instance of running away is proven anterior to the sale, which cannot constitute a habit.

As to Horace, trips to New York, to Liverpool and Charleston, and an absence of seven months, which ended by his capture only; the circumstance of his being sold as a runaway; the information given by the defendant's vendor, that he was a runaway, justify in our opinion

the conclusion which the jury and this court have taken.

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As to Boucaud, the circumstance of his having been purchased by the defendant, with a simple warranty of the redhibitory *maladies*, of his having been committed to jail as a runaway once, would not authorize the same conclusion. But he ran away twice, within a very few days after the plaintiffs purchased him, which raises a presumption, when coupled with the preceding facts, that the habit of running away existed before the sale. Indeed the cases of these slaves are not easily to be distinguished from that of *Macarty* vs. *Bagneries*, 1 *Martin*, 149. There, there was no evidence of any repeated act of running away before the sale, but the slave had been kept several months in jail, and not liberated therefrom, till the sale, and ran away soon after. Thus, Horace's voyages to New York, Liverpool and Charleston, and the declaration of his then master, excite as much apprehension and alarm as evidence of three ordinary acts of running away.

It is therefore ordered, adjudged and decreed, that the judgment of this court in this case be certified to the parish court, as if no rehearing had been granted.

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TURPIN vs. HIS CREDITORS.

Taxed costs of every kind are priviledged.

TURPIN vs. *HIS CREDITORS.*

APPEAL from the court of the parish and city of New-Orleans.

A. Bordeaux, Marie Louise, and other creditors of the insolvent, instituted suits against him, in June 1818, and on the 10th of July obtained judgment by default. On the 16th he filed his petition for the meeting of his creditors, and obtained an order for the stay of all proceedings against him, before the judgment by default became final. The creditors met, accepted the cession and appointed a syndic.

The creditors, who had obtained judgments by default, obtained against him a rule, to shew cause why the taxed costs in these suits should not be paid as priviledged debts, which after argument was made absolute. There being no personal property surrendered, no apportionment was made in pursuance of the rule, and these creditors opposed the homologation of the tableau of distribution, and obtained their collocation thereon, for these costs, before the mortgage creditors, who appealed from the decision of the court in this respect.

De Armas, for the appellants. The 21st arti-

cle of the Napoleon code is couched in the same words as the part of our statute on which the appellees rely. *Civ. Code*, 468, *art.* 78. In ascertaining therefore the legal meaning of the terms law charges, *fraix de justice*, in our statute, we will be much aided by the opinion of commentators and the decisions of courts of justice in France on the correct meaning of the same words in the corresponding article of the Napoleon code.

One could not imagine that by virtue of this article (the 2101st) a creditor, who had caused the personal estate of his debtor to be seized and sold, could pretend to a preference, on this account alone, on the proceeds of the sale. Pretentions of this kind were, however, admitted by an inferior tribunal, but set aside by a decree of the sovereign council of Brussels of the 11th of December, 1806. *Discussions sur le Code Napoleon*, 485. *Notes on art.* 2101.

Law charges, whichenjoy a general priviledge are *those that have a relation to the total mass of the failure*, such as those of seals, inventory and the like. 3 *Pardessus, Cours de droit commercial*, 320.

If the assignees or syndic had sustained law suits for the common benefit and judgment had

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been obtained against them, the right of the plaintiffs as to the costs, or that of the defendants as to their disbursements, would not be *a priviledge*. *Id.*

The collection of active debts may have occasioned charges and costs not taxed, *faux fraix*. The sale of personal property must occasion charges of appraisers, auctioneers, brokers, costs of stamp, registry. These it is just should be deducted, so as to present for distribution the clear proceeds of the things on which they accrue. *Id.* 397.

Law charges, which are those of seals, inventory and sale, *have for their object the preservation of the thing*. 3 *Guichard, Legislation hypothecaire*, 105.

The priviledge, for the charges of seals, &c. takes place in case of failures, as well as in cases of deceases. It can be applied to mortgage as as well as to chirographary creditors. *Nap. Code*, 2106, 2108.

Allais having failed, his real estate was sold and the personal being insufficient, the officers of justice claimed, by priviledge and preference on the proceeds, payment of the costs occasioned by the failure, and resulting from the affixing recognising and removing the seals. Bourcier and the insolvent's wife, creditors by mortgage,

opposed their collocation. They contended that such charges, being no ways useful to mortgage creditors, whose rights are preserved by the sole registry of their claims, could not be levied, by a resort to their prejudice, on the mortgaged property, but only on the other property, inasmuch as they are incurred for the sole advantage of chirographary creditors, and that the articles 2101 and 2104 of the Napoleon code, which allow a priviledge on real and personal estate for law charges, are not to have any effect in cases of failures, but only in cases of decease. The officers of justice answered that, as the law had not made any distinction, the courts could not make any. They obtained a judgment in the court of the department of La Loire, which was affirmed by the imperial court on the 28th of January, 1812.

The expenses of seals and inventories, those of sales, of the settling of the ranks of creditors, of the seizure, appraisement and auction and other law charges are to be levied before any other debts: *because they concern all the creditors; having been laid out for their common benefit. Domat*, 3, 1, § 5.

When a creditor causes the personal estate of his debtor to be sold, if there be no opposing creditor, it is evident that there is no priviledge

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or concurrence with any other person; and he is entitled to the amount of his debt out of the proceeds. But, if there be opposing creditors and a suit be instituted for distribution, the officer is to deposit the proceeds, after deducting his fees, and the several privileges are to be discussed. Among these, law charges occupy the first place. These charges are those of seizure, guardianship and sale, which are incurred *for the common interest of all.* It is evident that those which the creditor has made in order to obtain judgment do not enjoy this priviledge, because he has made them *for his own private advantage* only. *Nouveau Ferriere*, verbo *Privilege.*

The name of law charges is given to all the expenses occasioned by an act passed under the seal of a court of justice, whatever that act may be. The charges of acts are generally to be borne by those for whose interest they are made. 8 *Denisart*, 757, verbo *Fraix de justice.*

The expenses incurred in prosecuting a law suit are denominated law charges or costs: but the latter denomination is more particularly applicable to those which are privileged by law. The defendant has no privilege for his. The plaintiff has not a privilege for all the expenses

he has been at in obtaining judgment, but only those made to render his title executory.

If there be several creditors and the money is to be apportioned among them, the costs of the apportionment are to be taken out by preference. As to the costs, incurred by the opposing creditors, in the contestation, they are not to be paid by preference, unless the creditors were authorised to enter into such a contestation: otherwise they are to be classed for these costs as for their principal debts.

As the sale of the personal estate is necessary to procure the payment of the creditors, when it takes place under an order of court, the costs are to be taken out of the proceeds, because they are for the benefit of all.

The costs of seals and inventory, which preserve the goods seized and prevent their waste, have the same priviledge as the cost of the sales. *Tessandier, Regime Hypothecaire, 7.*

The only priviledged costs are those incurred for the common interest of all the creditors. 7 *Le Clerq*, 204.

Law charges, in the sense of the article 2101, are all those made to procure the sale of the thing and the distribution of its proceeds. A distinction is to be made between these charges and

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the costs incurred before courts of justice, in order to obtain judgment.

It must, therefore, be said with Ferriere, as to the law of the eleventh of Brumaire, in the seventh year, and with the orator of the tribunate, that the law charges, of which it is a question here, are those incurred for the preservation of the thing for the benefit of all those who have a right therein: those of seals and inventory, of sale or adjudication, those for making out the tableau and the determination of contests arising thereon, and, in a word, those which, according to the expressions of the tribunate, have for their object the preservation of the thing. 10 *Merlin, Rep. de Jur.* 20. verbo *Privilege*.

Law charges, are those which have been made, according to Domat, for the common cause of the creditors, for preserving their pledges, for discussing and making out the apportionment. In consequence, we are to consider as such the costs of seals, either after the failure or decease of the debtor, those of the inventory, sale and liquidation: those of conservatory acts, or instances in order to interrupt prescription, for a revendication, stoppage *in transitu*. Those which a creditor may have made for his personal advantage as to obtain judgment or render his title executory, cannot enjoy any priviledge,

but that which belongs to his claim, of which they are but an accessary. 1 *Perfil, Regime Hypothecaire*, 36.

Law charges which have a priviledge are those for affixing the seals after the decease or failure of a debtor, the sale of property seized and the like. *Vauvilliers, des privileges & hypotheques*, 4.

Law charges, in the 2101st art. of the code Napoleon, are those concerning the common interest of the creditors, such as those of seals and inventory. Those for the particular interest of a creditor follow the nature of the principal demand. 12 *Delvincourt, Cours du Code Nap.* 620.

Cuvillier, for the appellees. The judgment of the parish court is in conformity to the uniform decisions of this, in the cases of *Morse* vs. *Williamson & Patton's syndics*, 3 *Martin*, 282, *Morel* vs. *Misottiere's syndics*, as well as those of the superior court of the late territory, in those of *Ellery* vs. *Amelung's syndics*, 2 *Martin*, 242 & *Elmes* vs. *Esteva's syndics*, *id.* 264.

It is not in contradiction with the decision of the tribunal of the department of La Loire, affirmed by the imperial court of France, cited by the opposite counsel, nor the decree of the superior council of Brussels.

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Funeral expenses, law charges, certain medical charges, salaries of certain persons, the price of a debtor's subsistence are by our statute priviledged on his personal and real property. *Civ. Code*, 468, *art.* 73, 470, *art.* 76. The priviledge cannot be confined by construction to expenses incurred in the preservation of the thing; for they extend to every part of the debtor's property, whether incurred for the preservation of this or any part of it, whether they relate to his property or are merely personal. If a baker supplies me with bread, his priviledge immediately attaches: Will my subsequent failure destroy it? Certainly not; it will follow my property *after its cession*, in the hands of my creditors. If I employ an attorney, his taxed costs, those of the sheriff and clerk, if he bring a suit, are priviledged costs. My failure will not divest them of their rank, among other claims against me. If I succeed in the suit, these taxed costs are payable by the defendant against whom judgment was obtained: and there cannot be any good reason to say that they are not due as taxed costs, in the language of the statute as law charges, and recoverable as such. If so, the creditors of them have a priviledge on the property of the plaintiff and defendant and the failure of either cannot mar their rights.

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Tunis vs. His creditors.

MATHEWS, J. delivered the opinion of the court. This is a case in which a *tableau* of distribution of the insolvent's estate is offered for homologation, by the syndics, and opposed by two of the creditors. They claim, as a debt priviledged on all the moveable property of the insolvent, the taxed costs of certain suits, which they had prosecuted against him previous to his failure, and rely on that part of the statute which grants a priviledge to *law charges*, in general terms, without confining or limiting the expression to any specific costs and charges. *Civ. Code*, 468, *art.* 73. It is contended by the syndics that this part of our code is expressed in terms similar to those of the 2101st article of the Napoleon code, and the construction and interpretation given by French jurists to the latter ought to be adopted by the courts of this state. According to this, the terms *fraix de justice* (which correspond to the English words *law charges*) are confined to those expenses, which arise out of proceedings instituted for the benefit and preservation of the estate of the insolvent; and a number of authorities are cited, for this confined application of these terms. But, with whatever deference and respect, we may view the opinions of the authors cited, we are certainly not bound to adopt them. As the

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article of our code is indefinite and does not distinguish and limit the species of law charges intended to be embraced by it, courts of justice cannot make any distinction.

We are of opinion, that the statute accords to the appellees, the priviledge they contend for, as to every kind of judicial cost which may have been properly *taxed* against the insolvent.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed with costs.

WEEKS vs. *M'MICKEN.*

If A. gives an order to B. to receive a sum of money in New-Orleans, and B. writes to A. then his clerk in New-Orleans and will be a good opportunity to bring money, and A. desires that he may bring it and the clerk brings it and places it with B's money in a drawer, B. is liable therefor.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is an inhabitant of Bayou Sarah, whose business was usually done by the defendant and appellant, a merchant in St. Francisville. Having some money to collect at New-Orleans, from the house of Flower & Finley, he gave to the appellant an order on them for the amount; and subsequently, on being informed by the appellant that J. Tolman, his clerk, was in New-Orleans on a journey and might bring the ap-

pellee's money safely, he appears to have requested the appellant to commission him to fetch it, together with some other money which the appellee had in the hands of L. Millaudon. Tolman brought the money to St. Francisville, and deposited it with other monies in the drawer of a desk of the appellant's, in the appellant's store. The money, however, disappeared; and on the refusal of the appellant to refund it, the present suit is brought to compel him thereto.

The defendant resists this claim on the ground that this money never was delivered to him, but to Tolman, out of whose possession it was stolen. He proves that when Tolman arrived at St. Francisville, he (the defendant) was absent, and that the money had disappeared before his return.

That employers are responsible for the acts which the persons employed by them execute within the limits of their agency, and that, of course, merchants are answerable for the acts done by their clerks as such, is one of those plain rules which admit of no dispute. The only question here, therefore, is one of fact: Was Tolman acting in the line of his functions as clerk of the defendant, when he received, brought up and kept the plaintiff's money?

The defendant endeavours to stand out of the

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way by attempting to shew that Tolman acted at the request of the plaintiff. He exhibits a letter in which the plaintiff requests him to employ his young man to collect the money; but that letter is in answer to one in which the defendant informs the plaintiff that Tolman is at New-Orleans, and will be a safe hand to bring the money; and that letter refers to an order which the plaintiff had given long before to the defendant for that part of his money which was in the hands of Flower & Finley. The defendant was the person who did the plaintiff's business. Before Tolman went to New-Orleans, he had already received the order on Flower & Finley payable to himself, and needed no authorization from the plaintiff to send it by his clerk. Tolman brought the money, put it along with some of the defendant's in a drawer of the defendant's desk, and he and another clerk paid and changed money out of that drawer indiscriminately. It is strongly probable, though the witnesses did not disclose it, that the plaintiff was credited with the amount received for him at New-Orleans, for among the payments made by the clerks out of the drawer, is that of an order of the plaintiff for fifty dollars, which was *charged to his account.*

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We are of opinion, upon the whole, that Tolman acted, with respect to the plaintiff's money, as the clerk of the defendant, and that the defendant is liable for the loss of that money in his store.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livingston, for the plaintiff—the defendant did not appear.

BRIGGS & AL. vs. *RIPLEY & AL.*

APPEAL from the court of the first district.

If the consignor desires that the sale of the goods be not delayed, if on their arrival a certain price can be obtained and he afterwards draws for the net proceeds, and the consignee sells below the price mentioned, he is not liable for damages.

The petition stated that the defendants were indebted to the plaintiffs in the sum of 1637 dollars, which they refused to pay. At the foot of it was the affidavit of Sterling Allen, who styled himself the plaintiffs' agent, and swore that the defendants permanently reside out of the state. On this an attachment issued, which was levied on the ship Governor Griswold, which was claimed by Seth Grosvenor. The defendants pleaded the general issue, there was judgment

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for the plaintiffs, and the claimant and defendants appealed.

It appeared in evidence, that in May, 1818, Stockton, Allen & co. of New-Orleans, shipped to the defendants a quantity of manufactured tobacco, with the following instructions: "It is our wish that on arrival, it (the tobacco) should be sold, if not more than twelve cents and an half can be had per pound; the net proceeds are to be placed to the credit of Gardner & Center."

Gardner & Center drew on the defendants, in favour of the plaintiffs for 3500 dollars, at 60 days, on account of the proceeds of the tobacco, which the defendants accepted on the 25th of June, and on the 5th of October, they sold the tobacco at 10 cents per pound.

The ship, Governor Griswold, was sold by the defendants to Seth Grosvenor the claimant, in New-York, where both vendor and vendee have their domicil, while she was at sea, so that there was no actual delivery.

Morse, for the plaintiffs. The ship was well attached as the property of the defendants notwithstanding the sale to the claimant. As no delivery took place, the sale had not the effect of transferring the property to the vendee,

and she was liable to the attachment of the creditors of the vendor. This point has been frequently determined in this court. *Durnford* vs. *Brooks' syndics.* 3 *Martin*, 222. *Norris* vs. *Mumford*, 4 *id.* 20. This is the rule of the civil law, it is true, but that of the common law is perfectly the same. A grant or assignment of chattels is valid at common law between the parties, without actual delivery of the chattels, and the property passes immediately on the execution of the deed. But, as to creditors, the title is not perfect unless possession accompanies and follows the deed. *Meeker & al.* vs. *Wilson.* 1 *Gallison*, 419.

On the merits, we have shewn that our agent consigned our tobacco to the defendants, with directions not to sell it for less than twelve and an half cents, that they sold it for ten, so that we lost two cents and one half per pound, which we are entitled to receive.

Livermore, for the claimant and defendants. I contend, that the alienation, either by deed or will, of personal or moveable property is to be governed by the law of the alienor's domicil. *Huberus, Praelectiones juris civilis, tom.* 2. 1, 3. In this case the domicil of both parties to the bill of sale was in New-York, where the com-

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mon law of England prevails. By the common law it is clearly settled, that the property of a ship at sea, or in a foreign port, will pass by a bill of sale without delivery, in opposition to the rights of creditors. 1 *Gallison*, 423. 4 *Massachusetts Rep.* 663. 4 *Burr.* 2051.

I contend, that here was an actual delivery of the vessel and that the assignee got possession before the attachment was laid. The bill of sale was lodged by Gardner in the custom house on the 6th of January, and the attachment was laid on the 8th. In leaving this bill of sale at the custom house, Gardner can be considered as acting in no other manner than as the agent of the claimant, for whose benefit it was done. And he declares that from the time he received the bill of sale he considered himself as the agent for the claimant in all things which concerned the ship. He is also confident that he did at that time receive instructions from the claimant, though the letter is lost. But admitting him to be a mere *negotiorum gestor*, possession taken by him will benefit the claimant, for whose benefit he took possession, and who has at all events ratified his act. This is fully stated by *Cujas*, whom *Pothier* styles *juris interpretum praestantissimus*. In commenting upon the title *de adquirenda vel amit-*

tenda possessione, *ff.* 41. 2, 1, § 20, he says, *Sequitur in hoc § quod jam supra diximus saepe, per procuratorem nobis adquiri possessionem ita demum, si velit nobis possidere, si operam nobis solis suam accommodet, si possessionem apprehendat nostro, non suo nomine, et mandatu similiter nostro, vel etiam ratihabitione secuta, id est, volentibus nobis, non nolentibus. Scientibus autem vel ignorantibus nobis, voluntas nostra sufficit, nec requiritur etiam ut sciamus, procuratorem apprehendisse possessionem nostro nomine.* The following law in the Digest is also very strong to this point. *Generaliter quisquis omnino nostro nomine sit in possessionem, veluti procurator, hospes, amicus, nos possidere videmur. ff.* 41, 2, 9. This law, and also the commentary of *Cujas* upon it, are sufficient to support our claim. For there can be no doubt from the evidence, that Gardner intended to act as an agent and friend of Grosvenor, and that he believed he was acting as his agent. Upon the law last quoted Cujas observes, *Haec l. docet, nos possidere non tantum per servos & filiosfam., sed etiam per hominem liberum, id est, sui juris, si nostro nomine sint in possessionem, veluti per procuratorem, vel colonum et inquilinum, per hospitem, vel amicum voluntarium, ut Cicero loquitur, id est, per*

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negotiorum gestorem, secuta ratihabitione nostra. The evidence of Gardner that he had received instructions from the claimant, at the time he received the bill of sale, is strongly confirmed by the letter of Mr. Grosvenor which is in evidence. In this letter the claimant evidently writes to a man with whom he had previously corresponded.

In the next place, I submit to the court, that the plaintiffs cannot recover, because this action is not supported. The plaintiffs are not entitled to recover, 1st. Because the petition is insufficient. It is expressly required by law, that the petition set forth the cause of action. It merely alledges that the defendants are indebted to the plaintiffs, but whether upon bond, bill of exchange, for goods sold, or for slander, does not appear. This objection is conceived to be fatal, either on demurrer, or upon an appeal. This case is different from that of *Ralston* vs. *Barclay & al.* 6 *Martin*, 649, lately decided in this court. In that case the objection was not to the petition, but to the evidence as applied to the petition; and the objection was there made too late, being after all the evidence had been read to the jury, and

after the defendants had joined in the commission and put interrogatories to the witnesses.

The second objection is, that the plaintiffs have shewn no interest in the tobacco consigned by Stockton, Allen & co. to the defendants. The affidavit of Allen was sufficient for taking out the attachment; but is no evidence in the cause. The objection to this defect in the evidence could not appear upon the record, because no bill of exceptions lies to the decree of the judge. The defendants have appealed, and have assigned as the ground for reversing the judgment of the district judge, that the judgment was for the plaintiffs when it ought to have been for the defendants. If there is not evidence in the record sufficient to support the judgment, it is, of course, erroneous, and must be reversed. The affidavit is merely *ex parte*, and no evidence.

3. The defendants have violated no instructions. According to the true construction of the letter from Stockton, Allen & co. to the defendants, there is no positive price limited, within which the tobacco was not to be sold. The direction contained in the letter is positive only upon one point; to sell the tobacco upon arrival, if not more than a certain sum can be got for it. But the letter does not direct the defendants to hold

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the tobacco until that price can be obtained. In the absence of positive instructions, the law requires of a factor good faith and reasonable diligence. There is no pretence that these have not been shewn by the defendants. No proof has been offered that any damage has been sustained by the plaintiffs, in consequence of the sale of this tobacco. It has not been proved, nor can it be proved, that, from the time of the consignment to the present time a greater price could have been obtained for this tobacco than that for which it was sold. This action is then, in all its features, a hard action; and for this reason alone, if the letter is at all equivocal, the construction should be against the plaintiffs. Upon general principles of law, a principal, who complains of a disobedience of orders by his agent, is bound to shew that his orders have been precise and unequivocal; and the agent is only liable in case of a direct violation of precise and clear instructions. Here there are no positive direction to sell for less than twelve and an half cents. The most that can be made of it is, that the letter contains a strong expression of the writer's belief as to the probable price which could be had, and perhaps of his wishes that it should be held for that. This, however, is not clear; and, if it were, it would not be a rule up-

on which the court could decide in favor of the plaintiffs, consistently with the case of *Ralston* vs. *Barclay & al.*

The plaintiffs have sustained no damage. There is a difference between the disappointment of rather sanguine expectations and such damages as give a right to an action at law. We contend that some evidence should have been offered to shew that some loss had been occasioned by the sale here complained of; that it should have been proved, that the price of this species of tobacco has been much higher in New York, or at least there was a probability that it would be higher at some future time.

The plaintiffs had no right to limit the price absolutely. This consignment was made under an agreement entered into in New-Orleans between Stockton, Allen & co. and Gardner & Center, the agents of the defendants. By this agreement, Stockton, Allen & co. were to have an advance upon the consignment, but there was no agreement or consent on the part of Gardner & Center, that Ripley, Center & co. should be limited in the sale of this tobacco. This agreement was entered into by Gardner & Center as general agents of the defendants in good faith, and there is no pretence that they exceeded their

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authority. Of course, the defendants were bound by their acts, and were bound to accept the bills drawn by them and given to Stockton, Allen & co. for this advance. If these bills had not been accepted, the holders, Stockton, Allen & co. could have recovered damages against the drawers. The agreement was on one part, to consign the tobacco, on the other to make the advance by drawing bills on New York. Nothing was said about limiting the price. Consequently any limit which would interfere with the consignee's reimbursement, would have been in fraud of the agreement and not obligatory upon the consignee. Something has been said in the argument about the respectability of the house here; but when advances are made upon consignments, they are made upon the security of the goods, and not of the consignee.

MARTIN, J. delivered the opinion of the court. The plaintiffs' counsel contends that he has shewn that the tobacco was their property, that Allen, Stockton & co. were their agents and consigned it to the defendants, restricting them to sell it at twelve cents and a half per pound, and that as they sold it for ten cents, the plaintiffs have lost two cents and a half per pound, which it is the object of the present suit to recover.

As no specific cause of action was *alledged* in the petition, other than the non payment of an undescript claim, the evidence ought, at least, to have *established* the plaintiffs' right to a recovery, the general issue having been pleaded. That the plaintiffs were, in any manner interested in this shipment of tobacco, we are left to presume from the circumstance of Sterling Allen having, as their agents, made the necessary affidavit, in order to procure the writ of attachment. The conclusion is far from being strictly logical. He might have become their agent since the cause of action arose: even for the sole purpose of instituting the suit. Admitting him, however, to have been the plaintiffs' agent *ab initio*, does it follow as a necessary consequence that every transaction and consignment of his is for the account of these, his principals? Are also all the transactions and consignments of Stockton, Allen & co. for the account of the plaintiffs? If they be not, how is this consignment of tobacco to be distinguished from the rest?

But admitting all these queries to be properly answered in the affirmative, it is far from being clear that the defendants have been guilty of any deviation from the orders of the consignees. These gentlemen gave no positive instructions, except that the sale of the tobacco should not be

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delayed, if twelve cents and a half could be obtained *on its arrival.* They do not desire it, that if that price cannot be obtained then, and, after waiting a reasonable time, there be no hope of obtaining that price, the consignees may not sell under it.

With these instructions the defendants complied. The tobacco was shipped in May, and no sale took place until October. At first, they had been directed to credit Gardner & Center with the net proceeds of the tobacco. Afterwards, the consignors procured these gentlemen's draft, at sixty days, for the probable amount of these proceeds, on the defendants, who accepted it. It is true, the consignors' letter, accompanying the tobacco, communicated their hope that the article being of a good quality would sell well: and the restriction from delaying the sale, if on its arrival twelve cents and a half could be procured, is evidence of the consignors expectation that this price would be obtained. The draft, which was afterwards procured on the defendants, is presented by their counsel, as an evidence of the waiver of any previous restriction as to price. This court is not prepared to say that the draft could be considered as the waiver of any positive direction (if any had existed) not to sell below a certain price, but we

are ready to say that when no *positive* restriction exists, a draft for the proceeds of the consignment, justifies a sale, in order to meet it, altho' without it, prudence and the state of the market might demand a further delay.

No allegation of fraud or misconduct in the defendant is made. It is not shewn that the interests of the consignors would have been promoted by a delay, nor, that at any time, till the inception of the present suit or since a greater price could have been obtained.

It appears to us that the district court erred in giving judgment against the defendants. This being the case, that against the party intervening, as a claimant, cannot be supported.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants and claimant, and that the plaintiffs and appellees pay all costs in both courts.

LYNCH vs. *POSTLETHWAITE.*

APPEAL from the court of the first district.

If the subscribing witness to a deed reside out of the state, his handwriting

The petition set forth that, on the 5th of November, 1818, at Natchez in the state of Mis-

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being proved, the deed will be read.

When the party does not *formally* deny his signature, it may be proven by witnesses.

A report subscribed by a witness may be read, in order to weaken his testimony by shewing a discrepancy between what he signed & what he swears.

A stockholder cannot be a witness for the corporation.

Hearsay is no testimony.

A member of an unincorporated company is bound *in solido* for its debts.

The nature, validity and construction of a contract is determined according to the *lex loci* the remedy, according to *lex fori*.

sissippi, the defendant, by the name and style of chairman of the board of directors of the Natchez Steam Boat Company, for himself and others composing said company, did covenant and agree to give to the plaintiff the sum of 65,000 dollars for the steam boat Vesuvius, then on a voyage from New-Orleans to Louisville, said steam boat to be delivered at New-Orleans on her return, at which time 15,000 dollars were to be paid, and the residue in equal instalments, at three, six, nine and twelve months, with interest at six per centum, and that, at the time of delivery, the defendant should make his promissory notes for said four instalments, which should be signed by him as chairman of said company. The petition then avers an offer to deliver and refusal to receive, and, that the defendant had refused to pay according to the contract. It prays judgment for the said sum of 65,000 dollars or that the defendant be ordered to pay the sum of 15,000 dollars and to execute promissory notes as above stated, and concludes with a prayer for further relief.

The defendant pleaded, 1st. A general denial; 2d. In abatement, that there were seventy two other persons (naming them) who were parties with the defendant to the contract, and who ought to have been made parties to the suit.

3d, That the covenants were made by the defendant with seventy-two other persons associated in a special and limited partnership, having a capital stock of 100,000 dollars, of which defendant owns but 1000 dollars. 4th. The fourth plea states that the said company are now a corporation. 5th. The fifth plea sets forth the organization of the Natchez Steam Boat Company, that public proposals were issued on the 4th of January, 1818, for forming a company for the exclusive purpose of purchasing, or building and equipping one or more steam boats, and for raising for that purpose the sum of 100,000 dollars, to be subscribed by the persons forming said company, in shares of 100 dollars each share; that afterwards on the 24th of July, 1818, the subscribers met, formed rules and regulations, and elected nine directors; that the defendant was elected chairman of said board of directors; that in that capacity he addressed a letter to the plaintiff, offering to purchase the Vesuvius for the use of the company; that a correspondence took place, and that on the 10th day of October, 1818, the plaintiff proposed, in a letter to defendant, that the company should purchase from him the steam boats Orleans and Vesuvius, desiring an examination of the Orleans as she was reported to be rotten, and

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stating that "the character of the Vesuvius was too well known to need comment." The answer proceeded to set forth at great length the negociations between the parties, and contended, that the contract was conditional, and that the company were not bound to receive the boat unless satisfied with her condition after an examination; that the plaintiff, in his letters and conversations, misrepresented the qualities and condition of the boat; that he represented her to be entitled to certain patent rights which she was not. It further stated, that previous to the execution of the contract the plaintiff had the subscription list, proceedings, rules and regulations of the company, and that a conversation took place between him and the defendant, in which the plaintiff desired the defendant to sign the notes with one or two members of the company in their individual names, and not in the name of the company, and that defendant refused and said he would not be responsible further than his own share. It further charged, that the plaintiff had in conversation represented that the boat would return from Louisville early in December, and that he had in a letter offered to contract for the delivery of both boats on the 1st day of January, 1819, thereby inducing the defendant to believe the Vesuvius would re-

turn sooner; but that she did not return until the last of February. It concluded with setting forth a correspondence which took place between the parties in New-Orleans in February, an examination, and that the boat was so defective the company would not receive her.

The contract produced upon the trial, was executed at Natchez on the 5th of November, 1818, by the plaintiff and defendant, who described himself as "chairman of the board of directors of the Natchez Steam Boat Company," and was sealed with the private seals of the parties. By it, the plaintiff did "covenant and agree to sell to the Natchez Steam Boat Company the steam boat Vesuvius (now on a voyage from New Orleans to Louisville) with her engine, tackle, furniture, apparel and appurtenances of every name and description whatever, and that he, the said Jasper Lynch shall and will deliver the said steam boat Vesuvius to the said Natchez Steam Boat Company or its agent at New-Orleans, in good order, immediately on her return from her present voyage, allowing her a reasonable time thereafter for the discharge of the cargo she shall then have on board. And that he the said J. L. shall and will also at the time of the

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delivery, &c. make, execute and deliver a formal conveyance for vesting the title to the said steam boat in said company, and thereby guarantee and secure the title free of all suits, &c." On the part of defendant were the following covenants. "And the said chairman, board of directors and company, &c. on their part and behalf do covenant and agree, in consideration of the premises, to pay the said Jasper Lynch for the steam boat Vesuvius, the sum of 65,000 dollars, in manner following, that is to say, 15,000 dollars at the time of the delivery, &c. and the further sum of 12,500 dollars in three months thereafter, and the further sum of 12,500 dollars in six months thereafter, and the further sum of 12,500 dollars in nine months thereafter, and the further sum of 12,500 dollars residue of the said sum of 65,000 dollars, in twelve months thereafter, together with interest on the four last mentioned sums at and after the rate of six per cent. per annum from the said time of delivery of the steam boat Vesuvius, &c. And also that the said company at the said time of delivery of the steam boat Vesuvius, &c. will execute to the said Lynch their promissory notes for the payment of the said sum of 50,000 dollars, the residue of the purchase money at the times and in the manner above stipulated, with the interest

thereon as above expressed. And also, that they will, at the same time, make, execute and deliver to the said Lynch, a mortgage of said steam boat as a collateral security, &c." For the performance the parties bound themselves in the penalty of 20,000 dollars.

From the mass of written and verbal evidence in this cause it appeared, that the steam boat Vesuvius was built at Pittsburgh, in the winter of 1813 and 1814, that she came down to New-Orleans in March, 1814, and from that time until July, 1816, was employed in the trade between New-Orleans and Natchez. In July, 1816, she took fire and burnt to light water mark, in New-Orleans, having then a cargo on board and bound up. She was hauled up, rebuilt in the most substantial manner, and launched in January, 1817. When launched she was considered, in all respects, as good as a new steam boat. From this time she was employed in the trade to Louisville, and, as appears from the testimony, was considered, until after the contract was made, the best boat on the river. On the 27th of July, 1818, the plaintiff being at New-York, the defendant addressed a letter to him on behalf of the Natchez Steam Boat Company, stating their desire to purchase the boat as she then stood, and requesting to know the price. The

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plaintiff answered that he should be at Natchez in September. On the 10th of October, being in New-Orleans, the plaintiff addressed a letter to the defendant, in which he proposed to sell to the company the Orleans and Vesuvius, and stated his desire that the Orleans should be examined, as she was reported to be rotten, and that the character of the Vesuvius was too well known to need comment. Afterwards, on the 21st of October, he proposed to sell the Orleans for 50,000 dollars, and the Vesuvius for 75,000 dollars. In this letter the plaintiff says, "These two boats are running under the patent of Robert Fulton, and will, when merged in one stock, both enjoy the right of the exclusive trade between New-Orleans and Natchez, with the additional privilege attached to the Vesuvius to trade under the same right to the falls Ohio. I will sell the boats with all rights they may be entitled to. All questions, in respect to violation of patent rights, are reserved; though it may not be unnecessary to observe, that until the boats are in the full and undisputed enjoyment and benefits of the rights insured to them to the exclusion of all others, no claim can be interposed." This proposition was rejected: but on the 22d of October, the defendant, with William Rutherford and Augustus Griswold, two other mem-

bers of the company, wrote to the plaintiff, stating that they were authorized to offer him the following proposals: They say, "It is proper to premise that the delivery of the boats without any material injury sustained after leaving this port at the time prescribed is deemed indispensable by the company." They proceed to offer "for the steam boat Orleans, with her machinery, tackle and furniture of every description on board, to be delivered on her first return from the city of New-Orleans to Natchez, &c. 45,000 dollars." And "for the steam boat Vesuvius, now on her voyage to Louisville, to be delivered on her return to the city of New-Orleans with her machinery, &c. as in the case of the Orleans the sum of 65,000 dollars." This proposition the plaintiff refused to accept; but in about ten days after he acceded to the terms.

While the cause was in the district court the defendant made an affidavit, stating the absence of a material witness, by whom he expected to prove, that the original subscription list, proceedings, rules and regulations of the company had been shewn to the plaintiff some days previous to the execution of the contract, and that a conversation then took place, as to the mode in which the notes to be given in payment for said boat were to be executed, that the

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plaintiff objected to the mode proposed, and stated, that he had no acquaintance with the members of the company, and did not wish to to have to look to them for his money, and proposed to the defendant that he, with two others, should sign the notes without any allusion to the company; that the defendant refused to do this, saying that he would not become responsible beyond the amount of shares by him subscribed, and, that if the plaintiff was not satisfied with the security which the subscription list presented, the negociation must close, and, that the contract was concluded and signed some days afterwards. The affidavit further stated, that previous to the making of the contract, the plaintiff had represented the Vesuvius to be "a fine, strong, substantial boat, the best boat on the river, the *ne plus ultra* of steam boats;" that he represented that she would return to New-Orleans in December. The affidavit further stated, that the company had examined the Orleans fully, before concluding the bargain for her. The plaintiff's counsel admitted these facts as if sworn to, subject to all objections as to the legality of the evidence.

The Vesuvius returned to New-Orleans in February, 1819, having been delayed in her passage up the river by the unusually low state

of the water. Having been unloaded and put in good order, according to the testimony of the master, Capt. Penniston, the plaintiff on the 19th of February offered to deliver her to the defendant. The defendant refused to receive her without a previous examination by competent persons to report upon the situation of the boat. After some correspondence between the parties, persons were selected to report upon the situation of the boat and of her engine, but with an agreement that the rights of the parties were not to be thereby affected. After the examination, the defendant refused to receive the boat.

The report upon the engine was as follows, "We, the undersigned, having been called on by Messrs. Samuel Postlethwaite and Jasper Lynch to examine the engine of the steam boat Vesuvius, do report as follows: "The engine and machinery we find perfectly good, but the boiler is inferior to the engine on account of the age, as we understand is six years old, but appears to be water tight. We find that the cross beam on the piston rod is broken, but in consequence of that they have ordered a new beam to make the engine complete."

(Signed) W. C. Withers.
James Wilkinson."

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This report was offered in evidence on the part of the defendant, who also called Wilkinson as a witness. He testified that the boiler leaked, but not in an extraordinary manner, and that he considered it a good boiler for its age; that it had been newly painted with lamp black and oil, which might conceal some of its defects. That the head beam had been broken and fished.

On the part of the plaintiff it was proved, that the defendant was on board the Vesuvius a few days previous to the execution of the contract, that he had then seen the machinery, and had been informed by the plaintiff that the boiler was an old one, that it was the same boiler which had belonged to her before she was burnt, and that, if he did not sell the boat, he should get a new boiler. It was also proved, that, at the time of the examination at New-Orleans, the plaintiff shewed the head beam to the defendant, and said it was the only defective thing about the engine, and, that he had ordered a new one from New-York, which was daily expected. The defendant replied, "he did not know that would make any difference, if the engine was otherwise in good order." The report, upon the vessel, was as follows—1st. "We find by the examination that, on the starboard

side aft, a majority of her old timbers are defective, on the larboard side aft, some of her old timbers defective, a midship, some few of her old middle futtocks defective, her floor timbers are perfectly sound. 2d. It is our opinion, that the Vesuvius has sufficient new timbers to render her a safe cargo boat for two years. This is the unanimous opinion of the committee of examination." Signed,

Andrew Seguin, William C. Withers,
Allen Gorham, Charles K. Lawrence.

One of the persons who signed this report (A. Seguin) had been before introduced as a witness on the part of the defendant. He stated, that one third of the middle futtocks were entirely rotten, but that, in the state he found the boat, she might run two years longer and then be hauled up and repaired for five or six thousand dollars. He said that only one half of the boat was examined, but he supposed the other parts were similar. That, if he were to class the Vesuvius, he should put her in the 4th or 5th class. That the old timbers alone were defective, and, that he considered the boat in good order to receive a cargo, and seaworthy, in her present trade, for two years longer. A. Gor-

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ham was examined on the part of the plaintiff. He did not consider more than one tenth of the middle futtocks to have been defective. He did not believe she would require any material repairs within two years, and, if the boat was his he would not repair her now. When the boat was rebuilt she was cut down to the head floor timbers. The new wood constitutes 2-3ds to 3-4ths of the whole boat. Captain Gale, of the Ætna, testified that vessels built at Pittsburgh would generally require a thorough repair in four years, though some might last five years. W. Withers, considered the Vesuvius sound for her age, and sounder than the Orleans. Several ship masters and masters of steam boats, having heard the reports upon the vessel and engine with a statement of the evidence, deposed that, in their opinion, a vessel, such as the Vesuvius was described to be, was a vessel in good order; that, to be in good order, it was not necessary that she should be perfectly sound, and, that a vessel might be in good order and have one third of her frame defective.

On the part of the defendant, several witnesses deposed, that 65,000 dollars would have been a large price for the Vesuvius in November last, if she were entirely sound. The value of steam boats had since fallen 25 to 33 per cent.

There was judgment for the plaintiff in the court below: the district court being of opinion that the action lay against the defendant; but, the sum of 20,000 dollars was deducted from the consideration of the contract, and judgment rendered for 45,000 dollars only: the court being of opinion that, from the price agreed upon, the defendant must have bargained for a sound boat, that this price was the best key to the understanding of the term "good order," and, that 20,000 dollars was the medium between the sum of 15,000 and the sum of 25,000 named by different witnesses as the difference in value between a new and perfectly sound boat and a boat as represented to them.

From this judgment both parties appealed. The record contained all the facts shewn to the district court: with it came up several bills of exceptions.

1. The plaintiff having produced the contract between himself and the Natchez Steam Boat Company, subscribed and sealed by the defendant, and to which there was a subscribing witness, whose signature and residence out of the state were proven, as well as the signature of the defendant, the defendant's counsel objected to this paper being read, because it had not been proven by the subscribing witness.

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The district court overruled this objection, and the counsel took his bill of exceptions thereon.

2. The report of certain individuals, appointed by the parties was introduced on the part of the plaintiff, and objected to on that of the defendant, and ordered to be read, by the court, for the sole purpose for which it was offered, viz. to lessen the credit due to the deposition of one of these individuals, who had been examined for the defendant. Upon which the counsel took a second bill of exceptions.

3. The defendant's counsel put the following question to commodore Patterson, a witness introduced by the plaintiff for the purpose of establishing the soundness of the boat by him sold to the company: "If you had contracted for the purchase of a steam boat, in all respects *sound and in good order*, and a boat had been tendered to you under this contract, with one third of her important timbers, including her lower futtocks, rotten, would you deem such a boat answering the description in the contract, as being *in all respects sound and in good order?*" The question was objected to by the plaintiff's counsel and the objection sustained by the court, whereupon the defendant's counsel took a third bill of exceptions.

4. Charles K. Lawrence, being offered as a

witness by the defendant, the plaintiff objected to his being sworn in chief, on account of his being interested in the cause. On his *voire dire*, this gentleman declared that about the 20th of November, 1818, he purchased ten shares in the Natchez steam boat company, and in case the steam boat was declared to be the property of the company, he expected to pay his proportion of the price, as a stockholder. The objection was sustained, and the defendant's counsel took his fourth bill of exceptions.

5. Samuel A. Bower, a witness of the defendant's, proceeding to relate what he had heard a Mr. James, clerk of the steam boat say, the plaintiff's counsel objected thereto, and the objection being sustained, the defendant's counsel took his fifth bill of exceptions.

Livermore, for the plaintiff. A preliminary question to be settled in this cause respects the different systems of law prevailing in the state of Mississippi and this state. How far is the common law of England, which is proved to be the law of Mississippi where this contract was made, to govern the decision, and how far are the laws of Louisiana to have effect? We contend, that the nature, validity and construction of a contract must be deter-

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mined according to the laws of the state where the contract is made; that the form of entering into the contract must be regulated by those laws; that the consequences of any peculiar solemnity in the form, by which the parties obligate themselves to performance, must follow the contract according to those laws; and that the extent, to which the parties bind themselves, whether as principals or sureties, as principals or agents, *in solido* or not, must be determined by those laws. "*Quoad quae concernunt solemnitatem actus, seu ejus perfectionem, inspiciatur consuetudo loci celebrati contractus; et ideo si ex statuto loci requiratur certa solemnitas in ipso contractu, vel si ad subsistentiam contractus requiratur solutio gabellæ, vel quid simile; tunc tale statutum debet observari, licet in loco destinatae solutionis non sit simile statutum.*" *Peckius Ziricæus, de jure sist. & man. inj. c.* 8. *De Mercatura,* 744. 1 *Gallison,* 375. The parties are supposed to contract with reference to the law of the place in which they are at the time, and to which they owe a local and temporary, although they may not owe a permanent allegiance. This is the doctrine of *Huberus, part* 2, *l.* 1, *tit.* 3, § 1, 2, 5; of *Emerigon, tom.* 1. *ch.* 4, § 8, and of the common law of England. It is the doctrine of all civilians, and

may be considered as a settled principle of international law. *Ipsa questio magis ad jus gentium quam ad jus civile pertineat.*

The counsel for the defendant contended, that this was an executory contract, that it was to be executed in New-Orleans, and that the civil law must govern the construction of it. We answer, that the law of the place of execution applies only as to what shall be a discharge of the contract. *Gallison*, 375. But, in this case, the contract was executed at Natchez. The plaintiff "covenants to sell and convey the steam boat Vesuvius," &c. and that he will deliver her upon her return to New-Orleans, and then execute a formal conveyance, &c. In consideration whereof, the defendant covenants to pay certain sums at different times; the first payment upon the delivery. Here was the consent of both parties to the sale and purchase; and the boat being a thing *in esse* at the time, and belonging to the vendor, the contract between the parties was an executed contract of sale, and the property in the boat was transferred to the vendee. The delivery was postponed, and the payment also. But this does not change the nature of the contract. The purchasers acquired a property in the boat, although the vendor was to have the use of her for a voyage; and if, upon her re-

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turn to New-Orleans, the price of steam boats had risen, instead of falling, they could have recovered her as their own property, upon tender of the price. The plaintiff covenanted to deliver the boat in New-Orleans; and if the laws of Louisiana prescribed any particular formalities with regard to the delivery of a vessel, they ought to be observed; but for the construction of the contract we should have recourse to the laws of Mississippi. The Natchez Steam Boat Company also have their existence in the state of Mississippi; and the nature of that co-partnership, the powers of the acting members, and the extent of their obligations arising from the contracts by them made on behalf of the company, must also be determined by the laws of that state. Of those laws it is a fair presumption that the defendant has some knowledge, and that he knows something of the nature of the co-partnership of which he is a member, as the powers, rights, obligations and responsibilities of its members are defined by those laws. But the presumption does not extend to any knowledge of the laws of France or Spain, or of the nature of those associations which are styled "*les sociétés anonymes*," or "*les sociétés en commandite.*"

As to the form of the action, and the proceed-

ings upon it, however, the cause must be governed by the laws of Louisiana. The recovery is to be sought, and the remedy pursued, according to the *lex fori*. This doctrine is incontestible. *Communissima enim est distinctio, quod, aut disseritur de modo procedendi in judicio, aut de juribus contractus, cui robur, et specialis forma tributa est à statuto, vel à contrahentibus, et in primo casu attendendum sit statutum loci, in quo judicium agitatur. In secundo verò casu attendatur statutum loci in quo fuit celebratus contractus. Casaregis. disc.* 179, *n.* 59. Upon this ground the defendant's counsel have said, that the rules of evidence must be according to the laws of the state where the action is brought. To this we willingly accede. These gentlemen profess to have a leaning to the civil law; and yet they generally cite common law books, and not always books of the best authority. They have given us pleas in abatement, and raised objections founded only upon the common law, and have resorted very freely to the common law upon points of practice, the rules of proceeding, and the nature of the remedy pursued.

1. The first objection taken by the defendant's counsel is, that we have not proved the contract in a sufficient manner. The only exception

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taken to the evidence in the court below was, that the subscribing witness ought to have been examined. This is a common law objection, and we answer it by proving that the subscribing witness resided without the jurisdiction of the court, and by proving his handwriting. We had no means of compelling the subscribing witness to testify, and he was the same to us as if dead This is a sufficient answer at common law. I refer the court to *Prince* vs. *Blackburne*, 2 *East.* 250. *Adam* vs. *Kerr*, 1 *Bos. & Pul.* 360. 7 *T. R.* 265. 2 *John.* 451. 3 *John.* 477. But it is now intimated, that this contract should be proved by experts, comparing the handwriting of the defendant with other writings proved to be his. For this, the *Civil Code*, 306, *art.* 226, is referred to. We answer, that this mode of proof is only required, when the party formally disavows his signature. In the present case, the defendant has not disavowed his signature, but, in his answer, has explicitly admitted and set forth the execution of the contract by him.

2. The second objection is contained in a plea in abatement, which states that the contract was made by the defendant jointly with seventy-two other persons residing at Natchez.

3. The third objection is, that there is a variance

between the contract declared on and that proved; that we have declared against Postlethwaite, and have given in evidence a contract with the Natchez Steam Boat Company.

4. The fourth objection is, that the defendant is only liable to the amount of 1000 dollars, the sum by him subscribed.

These three objections resolve themselves into this question: Is the defendant personally bound to the amount of this contract, and can the plaintiff recover the whole from him? If the defendant be answerable for the whole, there is no variance, and the objection of want of parties is merely formal. It is not founded upon the merits of the cause, but upon the form of proceeding. *Rice* vs. *Shute*, 5 *Burr.* 2613. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. But, in actions against a partner, upon a partnership debt, the law of England allows the defendant, in a suit at common law, to plead in abatement, that the other partners are not joined. If he does not plead in abatement, it is a waiver of the objection. If the action is brought against all the partners and a recovery against all, the plaintiff may levy his execution upon the separate pro-

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perty of one. All of which shews that this is merely a matter of form. And these pleas in abatement cannot be pleaded with a plea to the merits, and they must be supported by an affidavit. In chancery, one partner may be sued alone, provided it be shewn that the others are out of the jurisdiction of the court, as is the case here. *Derwent* vs. *Walton*, 2 *Atk.* 510. *Mitford*, 25. As this objection, of want of parties, only goes to the form of proceeding, it is a sufficient answer, that, by the laws of this state, where several debtors are bound *in solido*, the creditor may proceed against either. *Civil Code*, 278, *art.* 103. *Pothier*, *des obl. n.* 270.

Is the defendant liable for the whole? He executed the contract under his private seal; and he admits himself to be one of the company. In either point of view, he is personally liable for the whole. He would be answerable from the manner of executing this contract, even if he had no interest in it; and if he had executed it in any other mode, he would still have been bound *in solido* as partner.

If the defendant had been merely an agent of the company, and not a partner, he would have been bound by this contract. He has personally obligated himself by the terms of the deed, and he has affixed his own seal to it. *Appleton*

vs. *Binks*, 5 *East*, 148. In that case the defendant entered into the agreement, "for, and on the part and behalf of lord viscount Rokeby," and affixed his own name and seal to the deed. He was holden personally liable. So where a committee for a turnpike corporation contracted under their own hands and seals, describing themselves as a committee, they were held personally responsible. *Tibbetts* vs. *Walker*. 4 *Mass. Rep.* 595. So where administrators of an estate, by proper authority from a court, sold the lands of their intestate, and covenanted in the deed "in their capacity of administrators," that they were seized of the premises, and had good title to convey the same; it was held that they were personally responsible. *Sumner* vs. *Williams*, 8 *Mass. Rep.* 162. The case of *Ernst* vs. *Bartle and others*, 1 *John. Cas.* 319, was an action of covenant by a clergyman against the trustees, elders and deacons of a church. In the deed the defendants described themselves as such, and made the contract "in the name and with the consent of the members of the church;" and they promise and bind themselves and their "successors in their respective church offices." The defendants signed the deed and affixed their seals to it. Upon demurrer it was objected, that the defen-

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dants were a corporation, and that the agreement was made with them in their corporate capacity, and that the suit was brought against them in their individual capacities. The court say, "It does not appear from the declaration, nor is it shown by the pleadings, that the defendants are a corporation, or capable of being sued as such. The names and additions by which they are described are a mere *descriptio personarum*, and they remain liable only in their private capacities. Without such a construction, the covenant would be nugatory and void; and there is no reason to adopt a different one. They have affixed their private seals to the instrument, not a corporation seal." In the case of *Taft* vs. *Brewster and others*, 9 *John*, 334, the defendants covenanted as trustees of a Baptist society. They were held personally liable. The court said, "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound, the church certainly is not, for the church has not contracted either by its corporate name, or by its seal." These cases are conclusive upon this question. For the defendant, the case of *Hodgson* vs. *Dexter*, 1 *Cranch*, 363, has been cited. The case of public agents is an exception to the rule;

and, where an agent of the government contracts for the benefit of government, and on its behalf, and describes himself as such, he is held not to be personally responsible, although, in cases of a private nature, it would be otherwise. The reasons of this distinction are stated by several judges. One reason is, that public policy requires that they should not be responsible, and that men would not accept offices under government upon the condition of being personally liable. 1 *T. R.* 172, 674. Another reason is given by Chief Justice Parsons, in the case of *Tibbetts* vs. *Walker*, 4 *Mass. Rep.* 597. "A case of this kind," he says, "is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state, in discharging all contracts made by its agents in its behalf, cannot, in a court of law, be drawn into question."

In this contract, the covenants are by the chairman, directors and company, who profess to bind themselves, their successors and assigns. The chairman alone affixes his seal to the contract. The others, therefore, are not bound. But this is no reason that he should not be bound, when he has obliged himself by the terms

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of the contract. On the contrary, according to the cases before cited, and upon the principle of the case of *Dusenbury* vs. *Ellis*, 3 *John. ca.* 70. it is alone a sufficient reason for holding him responsible. Although the defendant may have had full authority from the company for making the purchase, and, although his co-partners may be bound by the bargain, yet they are not legally obliged to the plaintiff so as to give him an action against them. Neither the defendant's authority as chairman, nor as partner, enabled him to execute a deed in their names, so as to oblige them to third persons, and to give an action of covenant upon the deed against them. *Harrison* vs. *Jackson*, 7 *T. R.* 207. *Clement* vs. *Brush*, 3 *John. ca.* 180. *Green & Mosher* vs. *Beals*, 2 *Cowen*, 254. It is, therefore, evident, that the plaintiff is without remedy, unless he can maintain this action. The defendant, however, can sustain no detriment from having his covenants enforced against him. He will ultimately be held to pay only his proportion, for he has his remedy for a contribution against his co-partners.

The defendant is also answerable for the whole amount, as a partner. Upon this point some very singular notions have been thrown out. Much has been said about specialty and li-

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mited partnerships, and the right to form such partnerships, also about the species of partnership known in the French law by the name of *la société anonyme*. A partnership of this description is not authorized by the laws of Mississippi. According to the law of that state, the members of an unincorporated company are liable for the debts of the company without limitation. *Watson, Partn.* [illegible]. The doctrine of special partnerships has no application to the case; for this contract was within the extent of the association, and as to all contracts within the scope of a special partnership the law is the same as in general partnerships. There is not a shadow of pretence for saying, that by the law of England the obligation in [illegible] is confined to merchants [illegible] general partnerships. The number of partners and the unequal distribution of their interests can make no difference.

Upon this branch of the case the defendant offers in evidence a conversation, which took place between him and the plaintiff [illegible] previous to the execution of the contract. [illegible] reference [illegible] d [illegible] It was the pla[illegible] [illegible] could have [illegible]nted [illegible] and he also a[illegible] [illegible]

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been in an error at the time with respect to the effect of a note signed in the mode proposed by the defendant. He did not execute the contract at the time, and the delivery of the Orleans was delayed, until the plaintiff had satisfied himself that each of the company would be liable upon those notes. This is alledged as a fraud! How so? Was the plaintiff the legal adviser of the company? But the evidence merely proves, that the defendant was ignorant of the law, and that he entered into a contract, by which he became responsible to a greater extent than he supposed. He should have consulted counsel. It is a common rule, that ignorance of law is not to affect agreements, even in equity. 1 *Fonbl.* 10[illegible]. *Bilbie vs. Lumley,* 2 *East,* 469. *Brisbane vs. Dacres,* 5 *Taunt.* 1[illegible]. *Est hoc discrimen inter ignorantiam juris et facti, quod omnis ignorantia juris supina est.* Cujas, *ad l.* 3. *D.* 22. *tit. de jur. et fact. ign.* *D.* 22, 6, 2. *D.* 22, 6, 4. *Si quis jus ignorans, lege Falcidia usus non sit, nocere ei* [illegible] *Divi Pii.* *D.* [illegible], 6, 9, 5. *N*[illegible] *tur, si,* [illegible] *ignoraret fidejussor* [illegible] *obligatum* [illegible]*erit, an mandati* [illegible] *et?* [illegible] *quidem facti* [illegible] *norantia* [illegible] *potest:* [illegible] *l.* [illegible]

jus, ad. l. 7 & 8. D. 22, 6. Here, ignorance of law is alledged, to furnish an unjust defence, *pradesse*, to excuse from legal liability. There seems to have been ignorance of law in both parties, in respect to this question. The plaintiff considered that the other members of the company were bound by this contract as well as the defendant. He did not advert to the effect of a seal at common law. He seems to have forgotten, that an agent, or partner, could not bind his principal, or co-partner, by deed. If, therefore, either party suffers from the mode of executing their agreement, it is him; and if ignorance of law can avail the defendant, he is without remedy. For this ignorance will not enable him to maintain an action upon the deed against the company in Mississippi. *Domat, l. 1, tit. 18, § 1, n. 16.*

But the evidence of this conversation was entirely inadmissible. The rule of law is, that all conversations are merged in a written agreement; and that no parol testimony can be received to alter, enlarge, abridge, or explain such contract. To this effect the civil law, which the defendant's counsel say should govern the rules of evidence, is explicit and positive. *Pothier, des obl. n.* 758, 759, 762. *Civil Code*, 349, art. 241, 243. Besides the case

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mon law, *Mumford* vs. *M'Pherson*, 1 *John.* 418. *Pierson* vs. *Hooker*, 3 *John.* 68. *Mogg* vs. *Smith*, 1 *Taunt.* 346. *Rich* vs. *Jackson*, 4 *Bro. C. C.* 514. *Meres* vs. *Ansel*, 3 *Wils.* 276. *Thompson* vs. *Ketcham*, 8 *John.* 18. Receipts, and other written instruments standing upon the same footing as mere verbal contracts, may be sometimes explained. But not specialties. The same principle will be found in the case of *Clark's exr.* vs. *Farrar*, 3 *Martin*, [illegible]. The defendant's counsel have cited several cases from *Phillips on evidence*. These are cases in chancery, in which parol evidence has been allowed in opposition to a bill for a specific performance. It has been allowed in cases of *fraud, surprise,* or *mistake*. But when the courts speak of mistake, as a reason for letting in parol evidence, they refer to mistakes of fact, and not of law. The gentlemen can produce no case in chancery, where a party's ignorance of law has been allowed as a reason for admitting this evidence. Such a reason would be contrary to a maxim adopted in the common law, without limitation or exception, *ignorantia juris non excusat*.

In this case it is not pretended, that the contract was drawn up in different terms from the understanding of the parties, or that any thing

has been inserted in it, which was not known, nor that any thing has been left out which was supposed to be there. The law must determine how far the defendant is liable upon this contract; and as the law determines that he is liable for the whole amount, the object of the parol evidence, if it can have any object, is to establish another contract; a contract for part, instead of the whole. The case of *Krumbhaar* vs. *Ludwig*, 3 *Martin*, 640, establishes that this cannot be permitted. The court say in that case, that "no testimony can be admitted to prove any contract different from that made by the bill itself. But this rule does not preclude enquiry into the consideration, as in the present case, between the drawer and payee." The parol evidence, in that case, was admitted to prove that no consideration passed between the parties to the bill. But it is a well known principle of the common law, that a deed imports a consideration, and that no averment can be admitted that it was made without consideration. *Vrooman* vs. *Phelps*, 2 *John.* 177. Independent of this doctrine, however, there was no want of consideration in this case.

5. The next objection is, that the Natchez company are now incorporated, and, that they intended to apply for an act of incorporation,

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and that this was known to the plaintiff. This objection seems scarcely to merit a serious answer. If the company had been incorporated previous to the 5th of November, this would not have been the deed of the corporation. And it is difficult to suppose that any subsequent act of the legislature of Mississippi can have deprived the plaintiff of his right to enforce this contract.

6. The next point made by defendant is, that the plaintiff must be in a condition to perform his covenants, and that unless this be shewn he cannot recover. The counsel alledge that the defendant has not tendered a deed, nor shewn his power to convey a good title to the Vesuvius. In support of their objection they refer to the case of *Morgan's heirs* vs. *Morgan*, 2 *Wheaton*, 290. In that case it appeared to the court, that the appellees were incapable of making a good title; and it is evident that if this had not positively appeared on the face of the proceedings the bill would not have been dismissed. *Page* 300 *of the case.* In the present case, the plaintiff did not make a tender of a deed, because the defendant refused to receive the boat, which made such a tender unnecessary; but he has always been able and willing to perform all his covenants. And if the court should have any doubt upon this point, this condition can be made

part of their decree. The plaintiff can make a good title now. But he submits to the court, that this title should be made as of the 19th of February, and that all expenses, incurred by the boat since that period, are properly chargeable to the defendant.

7. The next objection is, that this was a conditional contract. The defendant says, that he was not absolutely bound to take the Vesuvius; but that he had a right to examine her upon her return, and if not satisfied with her condition, that there was no contract. It is a sufficient answer to this objection, that no such condition is contained in the contract. But, if we look to the preceding correspondence, we shall find that an examination of this boat, farther than the examination at Natchez on the 21st of October, was never contemplated by either party, until the defendant found that some plan must be devised to free the company from a contract, which was like to be unprofitable. He then attempted to give this construction to the contract, and to obtain the plaintiff's acquiescence in it. The plaintiff refused to join in the examination, because he saw through this intention; but he did not obstruct the defendant in his examination. The letter of October 22d, will bear no such construction as the defendant has put on it;

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and of this he seems to have been sensible from the incorrect manner in which a part of this letter has been quoted in the answer.

8. The next objection is, that the defendant misrepresented the situation of this boat. It is said, that he represented her to be a "fine, substantial boat, the best boat on the river, the *ne plus ultra* of steam boats." This is mere general commendation, such as is made by vendors in all cases to enhance the price of their commodities, and upon which the purchaser is to exercise his own judgment. Unless there be an express warranty, or fraud, these representations, though false, cannot avoid the contract. *Decuir* vs. *Packwood*, 5 *Martin*, 300. *Quod venditor, ut commendet, dicit; sic habendum, quasi neque dictum, neque promissum est. Si vero decipiendi emptoris causa dictum est: æque sic habendum est, ut non nascatur adversus dictum promissumve actio, sed de dolo actio.* D. 4, 3, 37. *In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.* D. 4, 4, 16, 4. *Ea, quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti, si dicat servum speciosum, domum bene ædificatam.* D. 18, 1, 43. D. 21, 1, 19. *Pothier, de vente, n.* 263. *Domat, l.* 1. *tit.* 2. §. 11. *n.* 12. The

common law goes much further. Although the representations are material and false, yet if there has been neither warranty nor fraud, the vendor is not answerable. If there has been no warranty, it must be proved that he knew at the time that his representations were false. *Snell* vs. *Moses*, 1 *John.* 96. *Perry* vs. *Aaron*, 1 *John.* 129. *Mumford* vs. *M'Pherson*, 1 *John.* 414. *Bayard* vs. *Malcolm*, 1 *John.* 421. *Holden* vs. *Dakin*, 1 *John.* 421. *Chandelor* vs. *Lopus*, *Cro. Jac.* 4. Is there any pretence here to charge the plaintiff with fraud? It is not even alledged in the answer. The captain, pilot and engineer of the boat have been examined, and the defendant's counsel have not even ventured to ask a question relative to any particular knowledge of the plaintiff of defects in the boat. Fraud is to be proved, and not inferred from argument. *Dolum ex indiciis perspicuis probari convenit.* *Code*, 2, 21. 6. Where the fact is of such a nature that the vendor could not be ignorant of it, as of the yearly rent of an estate, he will be bound by his affirmation. But in this case the vendor had no more knowledge than the vendee. But these representations have been fully proved. That the Vesuvius was a fine, substantial boat, and the best boat on the

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river on the 5th of November last, has been proved by the testimony of Ogden, Gorham, Story, Withers and Patterson. Has the defendant attempted to prove that there was a better boat? And is not this a confession on his part that the Vesuvius was the best? That she was a strong and substantial boat is proved by A. Gorham. We have not, indeed, attempted to shew that she was the *ne plus ultra* of steam boats. This was not, in fact, said by the plaintiff, although it is admitted. He represented to the defendant that the engine was upon the best plan, and that it was the *ne plus ultra*. But if he had represented the Vesuvius to be a 74 gun ship, when she was before the eyes of the purchaser, would this representation bind the vendor? It is objected, that the boiler was not as good as that of the Orleans, that one was of copper and the other of iron. We answer that the boiler was exposed to view, and that the defendant might have examined it. Also that the plaintiff gave full and fair information as to the boiler.

9. The plaintiff is next charged with having represented that the boat would return in December. In the answer, the defendant states, that the plaintiff offered to contract for the delivery of both boats on the first of January,

Why was not this offer accepted? The defendant made his own calculations and preferred taking the chance. The cause of the Vesuvius not returning sooner is fully explained by Captain Penniston, and by Ryan. There was no fault on the part of the plaintiff, or his agents. The cause is to be found in accidents beyond the control of the plaintiff.

10. The next allegation is, that the plaintiff's letters contain misrepresentations respecting certain patent rights. The answer is, that every thing said upon this subject is strictly true, and has not been controverted by any testimony whatever.

Upon the three last objections it is sufficient to observe, that representations, even if false, cannot affect this contract; 2 *John.* 177, and that they are taken to be true, unless proved to be false.

11. We shall next consider the only question of importance in this case. Was the Vesuvius when tendered to the defendant, in the condition in which the plaintiff covenanted to deliver her; or was her situation so materially different, that the district judge was right in making a deduction of 20,000 dollars from the price agreed upon? The objections, made to the good order of the boat, relate to the head beam of the engine, the

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boiler, and certain parts of the frame of the boat. In all other respects it is admitted she is in good order. As to the head beam, we refer to the testimony of Captain Penniston, Griffiths and Briggs. It is true that Captain Gale says, he would not make another voyage with a beam broken and fished. But he had made one voyage to Louisville, a voyage of eight times the duration of a voyage to Natchez. The Vesuvius, also, had made her voyage up and down with this beam broken and fished. But the defendant was himself satisfied, that this objection, was too trifling and captious to be insisted on. He said that, "if that was the only defect in the engine it would be of no consequence, as another beam was soon expected." There was no other defect in the engine; and a new beam was received from New-York in a few days after, and was on board the boat when the trial commenced in the court below. Upon this point, parol evidence is admissible: either to shew an agreement to enlarge the time of performance; or to shew an admission of the defendant that the plaintiff had performed. *Keating* vs. *Price*, 1 *John. Cas.* 22. *Fleming* vs. *Gilbert*, 3 *John.* 528. If it had not been for this acquiescence, the plaintiff might have had this beam welded. But the arrival of a new beam

is a conclusive answer. The old beam was broken, without any fault on the part of the plaintiff, in the course of the voyage up the river. The captain informed the plaintiff, and sent on a model of the beam. The plaintiff immediately sent to New-York for a new one. Nothing more could have been done; for a beam of that description could not be procured in the western country nor here.

The boiler is not new; but it is in good order. Whatever defects it may have had, they were known to the defendant. Upon this, he had full information from the plaintiff, that the boiler was sufficient for the present, but, that it was old, and, if he kept the boat, it was his intention to have a new one.

The state of the hull is the next subject to considered. I refer to the report, and to the evidence of Gorham, Withers, Seguin, Burrows, captains Hart and Toby, and commodore Patterson. All of these witnesses swear to the *good order* of the boat; some from actual survey; others from having the report read to them, and from a fair description according to the evidence. The witness, upon whom the defendant chiefly relied in the district court, was A. Seguin. Whether his testimony agrees with the report which he signed, the court will judge.

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The report says, that "a few of the old middle futtocks amidships are defective, that a majority of her old timbers aft are defective, and it finds no defect forward." The new timbers are all sound.

The district judge has decreed a deduction to be made from the plaintiff's claim of 20,000 dollars; because he says the boat was not in that good condition that she ought to have been in. "So sound a price must require a sound hull," This price he considers as the "key" to the meaning of the words "good order." This is a new rule for the construction of agreements. A notion once prevailed in England, that upon the sale of a horse, for a fair price, and without an express warranty, the law implied a warranty that the horse was sound. Even this notion was not sanctioned by judicial decisions, and when it came to be sifted, it was found to be so unsatisfactory a rule of decision that Lord Mansfield rejected it. 2 *East*, 882. But, even this notion was confined to the sale of horses, an animal peculiarly liable to latent defects, which render him wholly useless. This doctrine of a sound price has at all events been limited to sales by parol, and has not before been called in aid to assist in the construction of a deed. The case of *Decuir* vs. *Packwood*, 5

Martin, 300, is a decision of this court in direct opposition to the doctrine of a sound price. So is the case of *Parkinson* vs. *Lee*, 2 *East*, 314, in the court of king's bench in England. The case of *Seixas* vs. *Wood*, 2 *Caines*, 48, is a direct decision of the supreme court of New-York to the same effect. The rule of the common law is laid down by *Forblanque*, 109, and the justice of it is ably vindicated by that author in page 371 of his notes to the Treatise of Equity. The books are full of cases to the same effect; and we find nothing but some vague notions of Professor Woodeson and Doctor Cooper to the contrary. Neither of these authors have even been considered as of great authority. If their notions are to be admitted, then the whole doctrine of express warranties, upon sales, becomes nugatory.

The defendant's counsel, however, profess a partiality for the civil law upon this point; and we have no objection to gratify them, by considering it according to that system of law. Taking then the civil law for our guide, we shall endeavour to shew that the decree of the court below is neither warranted by law nor by the evidence in the case. Although we are of opinion that the *lex loci contractus* ought to govern this contract, we have no objection to resort to

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that great mine of equity and natural justice, to which the lawyers of all modern nations have had recourse, the body of the Roman law. The actions *de redhibitione & quanti minoris* are given by the edict of the ædiles; and all the principles of law, which have been adopted in France and Spain in relation to those actions, have been drawn from the commentators upon that edict. We do not deny that a purchaser may avail himself of the equity of the *actio quanti minoris* as a defence to the *actio venditi*; because we are not disposed to deny the authority of *Cujas*, and because we believe that his reasoning is good.

The first principle of the Roman law to which we shall call the attention of the court is, that a contract of sale is not to be defeated, on account of any inconsiderable defect in the thing sold. *Res bona fide vendita propter minimam causam inempta fieri non debet. D.* 18. 1. 54. to the same effect, *Dig.* 21. 1. 1. 8. Were there such defects in this boat as to render her unserviceable? *Quod usum ministerium que hominis impediat.* The principle of the Roman law, adopted by the nations of modern Europe, is that the defect, which will entitle the purchaser to the *actior de redhibitione vel quanti minoris*, must be of such a nature

as to render the article wholly useless for the purpose for which it was bought, or so material that the vendee would not have purchased it at so high a price, if he had known of the defect. *Qui fortasse, si hoc cognovisset, vel emptarus non esset, vel minoris emptarus esset. Dig.* 19, 1, 39. The defendant has stated that the Orleans was examined before the purchase; and it is in evidence that the Orleans was much more defective than the Vesuvius. The company took the Orleans after the examination, being of opinion that she was sufficiently strong to run for one or two years without repairs: and because they knew what she had done, what the Vesuvius had done, and what the Washington had done; that they had cleared their cost in little more than a year. They calculated upon doing the same; and considered that their bargain would be a good one although repairs would afterwards be required.

Were there defects in this boat so considerable as to entitle the defendant to a rescission of the sale or reduction of the price? And were those defects so considerable as to entitle him to a reduction of $20,000? It is fully proved and is not denied, that all the new wood is sound. The new wood forms from two thirds to three fourths of the hull of the boat. Take

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the lowest estimate, and there remains but one third of the old boat. Of this old part of the boat the floor timbers form at least two thirds and indeed nearer three fourths. These are perfectly sound, leaving one ninth of the boat for the part complained of. So far the calculation is undisputed. Then, if we take the evidence of A. Seguin, there is but one third of this one ninth defective. So that by this calculation, the most unfavorable to the plaintiff, there is but one twenty-seventh part of the hull of the boat defective. But if we take the evidence of W. C. Withers and A. Gorham, that the boat is sound forward, that one third or two fifths of the lower futtocks amidships were new, and that of the buttocks or timbers aft, where the greatest defect was found among the old timbers, the old timbers were but one third of these timbers, and that here the old timbers were not all defective, but "a majority" of them, as is stated in the report, the defective part of the boat will be found to be much less considerable, and indeed not more than one ninetieth of the hull of the boat. Is not this an attempt to invalidate a contract of sale *propter minimam causam?*

The decree of the district judge has given an importance to these defects which the evidence

does not warrant. His calculation is founded upon the evidence of Capt. Gale, Capt. Rogers, and B. Story. These gentlemen know nothing of the state of the boat, except from the description of the defendant's counsel. How far this is a correct description, the court will judge from the question put to Story and the answers of the other witnesses to a similar question. This question supposes two thirds of the important timbers of the boat, including the middle futtocks, to be defective. The most important timbers of a boat are the stern post, the stem, and the floor timbers, all of which are sound. One would naturally suppose from this question, also, that all the middle futtocks were rotten, whereas but a small portion of them are so. At all events the witness would suppose from this question that one third of the boat was rotten, instead of one twenty-seventh or one ninetieth. In answer to this question, Story says, that he thinks 15,000 dollars would be the cost of making the boat perfectly new and sound, including the loss by detention. Another witness says 20,000 dollars, and another 25,000 dollars. Upon testimony of this description we have a decree deducting 20,000 dollars! This was taken as the medium. *In medio tutissimus ibis.* And this is in the face of all the evidence of

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those who had seen and examined the boat. Even in face of the evidence of A. Seguin, the favorite witness of the defendant. In the earnestness of *his* zeal, he did not think that more than 5 or 6000 dollars would be required to repair this boat, after she had run two years longer. It is true, that when he is specially sent for by the judge, his views enlarge, and his estimate is raised to 8,000, including detention. Two years hence it is to be supposed, that this boat will be more rotten than now; otherwise it will not be necessary to repair her then. And if she is then more rotten, the expense of repairs will be increased. So that, for the sake of A. Seguin's consistency, we must suppose the 8,000 dollars to have reference to that time, and not to the present. At this time she does not require repairs. A. Gorham says, he would not repair her now if she belonged to him. And so long as a vessel is a safe cargo vessel, it would certainly be very bad policy to haul her up and repair her, whenever a defective timber is discovered. If we are to credit the testimony of Captains Hart and Toby, as to the common condition of vessels, such a course of proceeding would certainly render this a very burthensome species of property. That the defective timbers in this boat do not detract from her strength

is proved by the report, which represents her to be safe for two years; and also by the testimony of Withers that wherever a defective timber was found, there was a sound one by the sideof it.

Another principle of law is, that the defect complained of must be one, of which the purchaser was ignorant when he made the contract. *Nemo videtur fraudare eos, qui sciunt et consentiunt.* *D.* 50, 17, 145. To this point the authorities are abundant. We shall cite a few of them. *D.* 18, 1, 43, 1. *D.* 18, 1, 45. *D.* 21, 1, 1, 6, *D.* 21, 1, 14, *sec. ult.* *D.* 21, 1, 37. *D.* 21, 1, 48. *Pothier, de vente, n.* 207, 209. The same rule prevails at common law. If the defect is apparent, or if the purchaser is informed of it, even an express warranty will not bind the vendor. *Schuyler* vs. *Russ*, 2 *Caines*, 202. An extention of this principle, or an application of it, is that parties are not admitted to alledge ignorance of notorious facts, or of facts which they might have learnt upon inquiry, or by the mere exercise of their own reason. *Ignorantia supina scientiae comparatur.* This principle is clearly and precisely stated in the 22*d book of the Pandects, tit. de juris et facti ignorantia, l.* 3, §. 1, *l.* 6, & *l.* 9, §. 2, also by *Cujas, ad l.* 3, *h. t.* Cujas says, *Emptori prodest ignorantia, quae non in supinum hominem cadit: ut si ignorans*

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emat servum morbosum, hoc casu habet actionem redhibitoriam. Item, si ignorans emat liberum hominem, habet actionem in duplum. Item, si emptor ignorans emat rem litigiosam, evitat poenam litigiosi contractus. Igitur justa et probabilis ignorantia facti non nocet, supina nocet. Supina est, si omnes in civitate sciant rem litigiosam esse, ipse solus ignoret; ignorentia prope dolus est, id est, affectata videtur. To the same effect are the cases put by *Domat, liv. 1, tit. 2, § 11, n. 11. Si les defauts de la chose vendue sont tels, que l'acheteur ait pu les connoitre & s'en rendre certain, comme si un héritage est sujet à des debordemens, si une maison est vieille: si les planchers en sont pourris: si elle est mal bâtie, l'acheteur ne pourra se plaindre de ces sortes de defauts, ni des autres semblables.*

We will apply the evidence to these principles of law. It is a notorious fact, that it is only about seven years since the first attempt was made to navigate the western rivers with steam boats; and that the Vesuvius was the second boat built at Pittsburg under the patent of Fulton and Livingston. It is proved by Ogden, that she came down the river in 1814, and, that from March, 1815 to July, 1816, she was employed in the trade to Natchez. During this

time she belonged to a company. In 1816 the plaintiff entered into an agreement with this company, by which she was to become the property of certain persons in New-York, for whom he was agent. Immediately after this, she took fire at New-Orleans and was burnt. The plaintiff immediately made a contract with A. Gorham to re-build her, and when rebuilt he was obliged to take her as his own property, his constituents having disavowed his contract. She was then put into the Louisville trade and employed to great profit until the time of making this contract. She made many remarkable passages, and acquired a reputation beyond that of any other boat on the river. The defendant and his co-partners, being well acquainted with the history and character of the Vesuvius, were desirous of purchasing her. The plaintiff being in New-York, the defendant addressed a letter to him, dated July 17, 1818. It is evident, from the terms of this letter, that the defendant well knew this boat and that he was satisfied with her. He proposes to purchase her as she then stood, without representation and without warranty. He asked for no information relative to the age, situation or qualities of the boat; because he knew, or thought he knew, sufficient upon these points. But he did not know that

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the plaintiff was disposed to sell, nor what price he would demand. To these points, therefore, his enquiries were alone directed. From the whole of this statement, is not the inference irresistible, that the defendant and his partners, constituting the greatest part of the merchants of Natchez, were well acquainted with the age of the Vesuvius? That they knew when and where she was built? When and where she was rebuilt?. And what proportion of the old boat was left? When the committee were on board at Natchez, we find that this burning was spoken of as a thing well known; that the plaintiff told them that the boiler was the same as had been in the boat before she was burnt; and that one of the committee even informed the plaintiff of the precise month when she was launched at New-Orleans. Is there not also sufficient here, from which a jury would find that the defendant was acquainted with the extent of the repairs, and of the proportion of the old boat which remained? She was burnt on the river, and, of course, when the fire extended to the water's edge she would sink. As she was then but little more than two years old, the proportion of her defective timbers could not be very great, and there could be no reason for not using the sound ones. The distinction between rebuilding

from the keel, and repairing from light watermark, hardly deserves a serious answer. A. Gorham considers her to have been rebuilt and made as good as a new boat. But if the committee at Natchez had not been thoroughly informed upon this subject, would they not have made some inquiries of the plaintiff? And is not the circumstance, of their not inquiring as to the extent of the repairs, conclusive evidence against them?

Having then established the fact, that the part of this boat complained of was more than four years old at the time of sale, and nearly five at the time of the examination, and that all this was known to the defendant, it merely is necessary that we shew her to have been a sound boat for her age, and we have completely demonstrated this part of the case. Withers expressly swears, that he considers the Vesuvius to be sound for her age. Captain Gale says that boats built at Pittsburgh will generally require a thorough repair in four years, though there may be boats that will last five years. Captain Toby says there are very few sound vessels, and they are not always perfectly sound when launched. Was not this boat then sound, in comparison with vessels of her age? Part of her hull was more than four years old; and the residue

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more than two years old when she was examined; and yet experienced carpenters report that she will not require repairs for two years to come. Possibly, in strict construction, a vessel cannot be called sound, which has any rotten timber, however immaterial; and such seems to have been the understanding of the witnesses; though Judge Washington makes a distinction between a vessel being unsound, and having some of her timbers unsound. *Watson & Hudson v. Ins. Co. N. A.*, 1 *Condy's Marshall*, 159 *n. b.* This question might be material, if there was an express warranty of soundness. But certainly the extent, to which the gentlemen attempt to push the doctrines of the civil law, is entirely beyond all bounds of reason. They would render the principles of that law, so just and equitable when properly understood and limited, utterly wild, extravagant and dangerous. They would establish a principle, which would operate to the subversion of all contracts of sale. For nothing is perfect in this world. Good and bad are relative and comparative terms. An old boat, or an old house, may be a good boat or house; but they are not so good, or capable of enduring so long, as the same boat, or house, when new. And yet they may equally be the subject of a

contract of sale, according to the civil as well as common law; for the Roman law is too perfect a system of equity to invalidate a contract of sale, on account of defects which are usual, and to be expected from the known age, situation, or employment of the thing.

The plaintiff covenanted to deliver this boat "in good order," within a reasonable time after the discharge of her cargo at New-Orleans. Did he not offer to deliver her in good order? Have not all the witnesses sworn that she was in good order? What do these terms imply? Is there no difference between the terms *good order*, and *perfect order*, or the *best possible order*? Certainly the term *good* is not a *superlative*, and the term *order* is not an *absolute*, but a *relative* term. An old vessel may be in good order, although she may have defective timbers; for a vessel must be in good order, to be seaworthy; and a vessel may be seaworthy and yet unsound in many of her timbers. Such is the natural meaning of the words, and such is the common acceptation and understanding of them. Com. Patterson is of opinion that a vessel is in good order if not more than one third of her frame is defective. Her frame includes the floor timbers, top timbers, upper, middle and lower futtocks. Here the de-

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fect is not more than one twenty-seventh, according to the defendant's witness, and one ninetieth according to the plaintiff's. The understanding of Com. Patterson, and of all the other witnesses, is that a vessel is in good order, when she is in a condition to receive a cargo and perform her voyage. It seems to be admitted, that the word is commonly understood in this manner, and that it is the true meaning in all cases, except when made use of in a contract of sale. Upon what principle of law is a different rule of construction to be adopted in a contract of sale from the ordinary rule? Words are to be understood in their natural and ordinary meaning; terms of art are to be understood as used by persons using the art. These are rules for the construction of all agreements. Can "good order," as used in this agreement be considered a warranty of soundness? Or can it have reference to any defects existing at the time? The words do not apply to the sale, but to the delivery. The boat is sold as she is, without warranty, and the property transferred to the purchaser; but she had left the port where the contract was made, and was not to be delivered until her return to New-Orleans. What was to be delivered? Was it a different thing from what the defendant had purchased? Was

it a boat absolutely perfect and sound? Was it a covenant, that the plaintiff would cause her to be hauled up on the stocks, thoroughly repaired and made as good as new? Was it intended, for the purpose of invalidating the contract of sale, on account of defects then existing in the boat, and which both parties must have known, if they had exercised their reason at all, did then exist? Does not such a construction lead to an absurdity? And is it not therefore to be rejected? These words were inserted with a very different view. The intention and effect of them are to bind the plaintiff to a degree of responsibility, to which he was not bound by the general rule of law. After the execution of this contract the relation between these parties was that of a lender and borrower; and independent of the words "good order," which were interlined in the deed in the plaintiff's own hand writing, he would have been answerable for no higher diligence in taking care of the defendant's property than is prescribed by the law upon the contract *commodatum*. This merely obliges him to strict diligence, but does not make him liable for casualties. Or perhaps more correctly speaking, he would have been only liable as vendor remaining in possession after the sale by consent of

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the vendee. In this character he is liable only for ordinary care. *Pothier, de vente, n.* 54. If the boat had been wholly lost, the plaintiff could not have recovered the price; because the delivery is made, by the deed, a condition precedent to the payment; and where a condition precedent becomes impossible by the act of God, the covenant depending upon it is void; in which respect such a condition differs from a condition subsequent. But provided the boat returned to New-Orleans, although greatly damaged and deteriorated, provided this damage were caused by accidents beyond the plaintiff's control, and not by his fault, or the fault of his agents, he might have tendered her in the situation in which she was and have demanded payment. If these words, "good order," had not been inserted in the contract, the plaintiff would not have been obliged to repair any such damages. The object of the defendant, therefore, was merely in pursuance of what had been declared by him in his letter of the 22d of October, and also to have the boat in such a condition when delivered, that she might be immediately employed. The boat sustained no injury, between the execution of the contract and the offer to deliver, through

the plaintiff's fault; and the only injury sustained by accident has been repaired.

12. The last point made on the part of the defendant was, that our prayer for relief is not sufficiently definite. I have strong doubts whether any further prayer is necessary than the general prayer for such relief as the equity of the petitioner's case may require. But in this case we have prayed for the price of the boat, sixty-five thousand dollars, and our general prayer will certainly cover the interest. We do not pray for the whole sum at this time, because it is not due; but we ask that it may be paid at the times and in the manner stipulated for in the contract. It is said, that we must either sue for the penalty of twenty thousand dollars, or for a performance, and that we cannot sue for both. We do not sue for both. We sue upon the contract. Twenty-seven thousand five hundred dollars are now due with interest. The balance the defendant is bound to pay by instalments at six, nine, and twelve months from the time the plaintiff offered to deliver the boat, with interest at six per cent. And for these payments he is also bound to give his notes in the form expressed in the contract, and also a mortgage as collateral security. In the case of *Decuir* vs. *Packwood*, 5 *Martin* 300,

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the sugar was payable by instalments; and the action was brought before either instalment became due.

Several bills of exceptions were taken by the defendant's counsel in the court below, which I hardly deem it necessary to notice. If the loose conversations and letters of a witness are good evidence to discredit him, when they are inconsistent with his testimony, *à fortiori* a solemn report, signed by him immediately after an examination of the thing, may be admitted to prove that he has certified to a statement different from what he has represented upon oath. The question put to commodore Patterson was obviously improper. It did not apply to the contract; for the contract was not for a sound boat. Nor did it apply to the evidence, according to which the boat is not in the situation which the question supposes. A further objection to this question is, that it required the opinion of commodore Patterson upon a question of law. Captain Lawrence was interested and incompetent; since he expected to pay his proportion of the price in the event of a recovery. I should consider it disrespectfull to the court to notice the fifth bill of exceptions.

Such are the objections made to our right of recovery. If the conduct of the plaintiff has

not been distinguished for good faith in the whole of this transaction, we do not ask a judgment. But if the exceptions taken by the defendant are merely frivolous and captious; if they are merely devices intended to worry the plaintiff into an abandonment of his rights, and to relieve the Natchez company from a contract, which is not found to be so advantageous as was supposed in November last; we trust the judgment of the court will give a useful lesson to purchasers not to sport with their faith. When this bargain was made, the advantage was supposed to be on the side of the purchasers. In the proposition which the plaintiff submitted to the company he demanded for the Vesuvius seventy-five thousand dollars, which sum he did not consider to exceed her value, and judging from his own experience of what had been done, he believed that the Natchez company would only be obliged to advance the first payment, and that the profits of the boat's employment would meet the other payments. In answer to this proposition, the company offered sixty-five thousand dollars, which the plaintiff refused to receive. Upon further reflection, he consented to accept this sum; but it was not until a fortnight after it had been proposed, and when the company

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were at full liberty to recede. Does this look like the conduct of a man who was selling an article, which he knew, or believed, to be worth much less than the sum offered? If he considered the bargain an advantageous one at the time, would he have risked such a delay? No. The advantage was believed at the time to be on the side of the company, though subsequent events have given a different aspect to this contract. In consequence of the river being unusually low, and continuing so for an unusual length of time, the return of the boat was retarded until February. In the mean time the value of steam boats had depreciated. Instead of full freights and constant employment, the harbour was filled with boats unemployed. A reduction of the rates of freights was the consequence—and a greater reduction in the value of steam boats. It was then that the Natchez company found their bargain not to be an advantageous one, and it was then that they determined if possible to free themselves from it. It was then, that the idea suggested itself to them of ripping up the sheathing, and examining the timbers of this boat. I say, it was not until then, because if such a proceeding had been originally contemplated it would have been provided for in the contract. The Natchez company being well

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acquainted with the history and age of the Vesuvius, knowing that she was built at Pittsburgh in 1813 and that some part of her original frame remained, knew that in the ordinary course of things she must have defective timbers. This knowledge had no effect to prevent them from concluding the contract; because they also had sufficient information, that if the course of trade remained as it had been and then was, they could clear the price of the boat with interest, before she would require repairs. These gentlemen are sufficiently well informed to know, that a boat may be a safe cargo boat, seaworthy and fit for her customary imployment, and at the same time have many defective timbers. Having then made the examination, and having found the defects which they expected to find they refuse to receive the boat, and compel the plaintiff to resort to a court of justice for the recovery of his just debt. And in what manner does the defendant meet the merits of our cause? By an attempt to embarrass it with innumerable formal objections, having no substance either in law or in equity, and being many of them inapplicable and inconsistent with the facts. By loading the record with bills of exceptions upon points unimportant, and upon which the decision would not have been other-

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wise than it is. For what purpose all this, unless to obscure the merits of the case? I shall conclude with one remark; that the defendant, or either of the directors of the Natchez company, could hardly have reconciled it to themselves to violate such a contract, or to make such a defence in their private capacities, which, as the agents and directors of a company, they have considered themselves justified in doing.

Hawkins, for the defendant. Two questions present themselves for consideration, before the case be examined on its merits.

1. Are the laws of the State of Mississippi, or of Louisiana, to govern this contract, it being made at *Natchez*, but to be executed at *New-Orleans*; or, are the *laws* of *both* countries to be resorted to, to *regulate* the *rights* and *duties* of the *parties*?

The authorities quoted from the common law books on this subject are, 3 *Dallas*, 370, 4 *id.* 327, 2 *Johns.* 235, 1 *Gallison*, 374, 5 *Johns.* 239. In neither of the cases referred to, does the question appear to be fully settled. On this subject the common law reporters seem to have borrowed their light from commentators on the civil law.

In the note found in 3 *Dallas* translated from

Huberus, after propounding a number of cases, this author furnishes the principle; "That the place, however, where the contract is entered into is not to be exclusively considered."

If the parties had in contemplation another place at the time of making the contract, the laws of the latter will be preferred in the construction of the contract. Every one is considered as having contracted in that place in which he bound himself to pay or perform any thing. And the notes to the case in 1 *Gallison* sanction this doctrine, by giving as exceptions to the principles there laid down cases growing out of contracts made in one place, to be executed in another.

The most clear and satisfactory view of this subject is to be found in the decisions of the present supreme court of our own state. *Le Breton* vs. *Mouchet*, 3 *Martin*, 111, 50. *Hampton* vs. *Brig Thaddeus*, 4, *id.* 585.

In these cases the court have relieved the question from the doubts and difficulties found in the common law authorities; and in the latter case, 585, the principle is recognised; that the law of the place where the thing is stipulated to be done or given is the *lex loci* of the fact which gives rise to the obligation, and

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must therefore regulate the rights and duties of the parties.

It has been strongly relied on by the plaintiff's counsel, that by the contract sued on, the rights of the plaintiff vested rights, not to be affected, or controlled, by the laws of Mississippi, as upon a contract fully executed there; and hence is presented the question

2. Is the contract sued on by the plaintiff an executed or merely an executory contract?

If on this point no authority could be adduced, the plain but sound principles of interpretation, would conclusively establish the contract sued on as merely executory.

All contracts must be considered as executory which contain subsequent conditions and duties, the performance of which are essential to the rights of the parties.

In the contract before the court, every act essential to its consummation, every act necessary to the objects of the contract and rights of the parties, was to be done and performed subsequently to making this covenant at Natchez.

It is not a contract of sale vesting any right or title to the boat, but a mere agreement to sell. The seller imposing on himself various conditions to be performed before the sale was consummated.

What were the conditions? "That on her return voyage the Vesuvius should be delivered, at New-Orleans in good order, to the company or its agent, that at the time of delivery the seller should make, execute and deliver a formal conveyance vesting title in the company, and by said conveyance guaranty and secure the title to be free from all suits, liabilities and incumbrances whatsoever." Until the boat was so delivered at New-Orleans, in good order, and with the title stipulated to be made and delivered, no right occurred to the plaintiff, to demand of the company any performance on their part; for the company stipulated to pay nothing until each and every of these conditions were previously done and performed by the plaintiff, and until they were so performed, the plaintiff had no one vested right which could be sued for or enforced. Yet, according to the doctrine contended for by the counsel for the plaintiff, all his rights were vested and perfect by merely signing the covenant sued on.

Had the Vesuvius been lost on her voyage to Louisville, would the loss have fallen on the Natchez Steam Boat Company? Clearly not. If the company had no vested right to the boat surely the plaintiff could have no vested right

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to recover the price proposed to be given for her by the contract.

When the Vesuvius was tendered to the company in New-Orleans, had they not a right to require that, she should be in the good order, and accompanied by delivery to the title, stipulated by the contract? Having this right; the right to examine the boat and ascertain her condition cannot be questioned, and having by such examination found the boat not in the good order required, or, contemplated by the contract, the right to refuse the boat followed as matter of course.

With all these conditions to be performed on the part of the plaintiff, and the performance of which were indispensable before any right accrued to the plaintiff, or responsibilily attached to the company, it is difficult to find, even plausible pretexts for giving the instrument sued on, any other than its true executory character.

The only authority relied on by the plaintiff's counsel to give to the articles made at Natchez the dignity and effect of an executed contract is found in our statute. *Civ. Code*, 346, *art.* 4. If this article can be construed to be at all applicable to this question, its application is fully made and explained in the same statute, 346,

art. 7, which declares that a sale may be made purely and simply, or, under a condition either *suspensive* or *resolutive*.

That there are conditions in this contract, and that they are properly suspensive conditions cannot be doubted. The effect and nature of these conditions, as illustrated by both common and civil law authorities, fully support the principles contended for by defendant's counsel.

And the nature of this contract is also strongly exhibited and well settled by the case of *Hampton* vs. *the Brig Thaddeus*, where we might with propriety pursue the very language of the court, and say that this contract "began to be executed at Natchez." Its covenants enjoining the performance of essential conditions elsewhere, the contract cannot be considered as executed, or consummated until these conditions are performed; the place of delivery is the place of performance—and the laws of the place of performance govern the rights of the parties. 2 *Black.* 443. *Civ. Code*, 272. 274. 1 *Pothier obl.* 176, 198, 201, 202, 203, 218. 4 *Martin*, 582.

Well aware that this action cannot be maintained against the defendant, if tested alone by the laws of Louisiana, the counsel for the plain-

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tiff have found it necessary to resort to the principles of the common law, on the subject of partnerships, to find ground for recovery.

The extraordinary nature of this action compelled the defendant to file several pleas in order to embrace the whole merits of his defence. The first properly in order, is the plea in abatement, a plea necessary to repel the assumed right to recover of the defendant individually as a member of a common commercial partnership. Admitting the covenant sued on, established, such partnership which, however, is positively denied, as well by the contract itself as the pleadings, the plea in abatement would be fatal to the plaintiff's action according to the principles of the common law. And by our own legislative acts, all the parties should be made defendants in the petition. These principles are so well established as to need no comment. 5 *Burrows, Rice* vs. *Shute. Watson on partnership* 119, 131. 2 *Johns. cas.* 382. 1 *Comyns on contracts* 326.

The only answer given by the plaintiff's counsel to the plea in abatement was, that the co-partners of the defendant reside out of the jurisdiction of this state.

By examining the authorities they relied on to maintain this position, it is believed that they

will be found not at all applicable. The cases to which they refer were cases, where the party, plaintiff by bill in equity, sought redress, alledging as ground of relief that some of the parties were non-residents.

And in all cases to avoid the force of the plea in abatement, it is indispensable that the allegations of non-resident parties, or partners should be made and relied on specially in the bill seeking relief. But no case has been quoted at bar, or found by the defendant's counsel, where the plea in abatement has not been deemed good, when offered at a proper time and furnishing all the partners who should have been united in the action.

If the plaintiff be permitted to go to the rules of the common law to find our liability as a common commercial partner, he must submit to the rules of the common law in repelling the liability he thus seeks. The more especially as he has to go beyond the stipulations of the writing sued on, to find any cause of action at common law.

We will now consider the grounds of defence found in the special plea in bar to the plaintiff's action, in which the defendant relies, that the contract was executed by him as chairman of the company, purely in the character of agent.

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That the company was not formed for general commercial purposes, but special and limited objects, with a view to incorporation, and now is actually incorporated.

That the whole character, objects, names, amount of stock, and special liabilities of the company were made known to the plaintiff, and that the contract was entered into, not with the defendant individually, but, with the company, with the view only to such special purposes and liabilities.

Under this plea, two questions are presented.

1. Could the company at Natchez appoint an agent designated as chairman, who could by contract bind the company for the objects of association: and could the acts of the agent (for and on account of the company and within the pale of his authority) be so construed as to produce individual liability on the agent?

That the company could lawfully appoint their agent, giving him the description of chairman, or any other, and vest such agent with power to bind the company, cannot be questioned. By the counsel for the plaintiff it has not been denied. Have the Natchez Steam Boat Company appointed such agent, vested him with such power, and has the defendant, as such agent, so transcended the pale of his power

as to become individually bound to the plaintiff in this action?

In the plaintiff's bill of exceptions to evidence he objects to the evidence offered by the defendant, except such parts thereof as tend to prove the "minutes, rules, regulations and subscription paper of the Natchez Steam Boat Company, and that the same were read by the plaintiff before the execution of said agreement of the 5th November, 1818." These papers and facts, therefore, are considered as duly proved and properly before the court, and clearly establish all that is necessary to maintain the defence relied on in the special plea of the defendant. The documents prove that, in the organization of the company, and, conformably to its rules and regulations, the defendant, Postlethwaite, was duly appointed chairman.

The company resolve conformably to the objects of association to purchace one or more steam boats. On the 22d of October 1818, the company pass a resolution authorising the defendant and two others to submit propositions, or respond to propositions submitted by the plaintiff, conformably to this resolution, said three persons informed the plaintiff that his proposition had been considered, and the writers were authorized to offer those of the company.

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These were the propositions which the plaintiff finally acceded to, and on which the contract was based.

Thus, then, we have the appointment of the defendant as chairman, the resolution of the company authorising him to make the purchase and the propositions made conformably to this resolution giving the terms and conditions and going to the extent of the authority conferred by the company. And conformably to these terms and conditions (substantially) was the contract finally made, signed by the defendant in his character of agent or chairman.

Are there any covenants in this contract personal to the plaintiff? None.

Are there any which go beyond the authority given by the company to contract for and bind them? None.

In fact, throughout the whole negociation, in all the letters and communications from the defendant to the plaintiff, he uniformly speaks of himself as the agent, acting for and on behalf of the company.

This is a candid and correct view of the relative situation of the parties, as to the agency of the defendant and his having acted and covenanted alone in the character of agent.

To convert the limited and acknowledged re-

sponsibility of an agent, (acting with good faith as such, within the authority conferred, and for the benefit of those conferring it) into the enlarged and ruinous responsibility, contended for by the plaintiff's counsel, would be breaking down long and well established principles of law, principles which have found encreased sanction from encreased scrutiny.

It would be a mere parade of books to present a long list of authorities for principles which have received the repeated and solemn sanction of our own supreme court. The following authorities have met with no satisfactory answer from the plaintiff's counsel.

"A contract has no effect, except with regard to the things which are the objects of the agreement and to the contracting parties."

"The agreement being formed by the intention of the contracting parties, can have no effect except with regard to what these parties intended and had in view."

"If the agreement be made in the name of another, and as having been entered into by a commission from him, the agreement would be made with him by my agency and not with me."

"A person acting avowedly as agent, is not liable personally." 1 *Pothier, obl.* n, 53, 85, 86. 3 *Martin*, 641. *Civ. Code accordant.*

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2. Were the company at Natchez competent to associate themselves in special and limited partnership; and, by contract, bind themselves alone in the limited and special character contemplated by the association?

Instead of such associations being prohibited in our country, it would be difficult to suppose a case, which could exclude their formation: and when so formed, it would be equally difficult to find any sound principle of law or morality, which should make the members thereof liable, beyond the express responsibility held out and guaranteed to those with whom they should contract.

The counsel for the plaintiff have presented no such case; nor have they furnished any answer to the grounds relied on and authorities quoted by defendant, to shew, that the partnership at Natchez, if any, was a limited and special one, sanctioned by law; that the plaintiff contracted with them as such; and that the company alone, and not the defendant is bound by this contract. The right to form such special partnerships is found in our own code, as well as the common law books; and when so formed the members are alone responsible according to the special terms of association, and responsibility held out to the contracting party. *Civ.*

Code 391, *art.* 12, 13, 18. *Watson on part* 3 & 4. *Johns. cas.* 171.

Being unable satisfactorily to repel this ground of defence, the plaintiff's counsel found it necessary to evade it by calling on the court, to seek the responsibility of the defendant as member of a general, or commercial partnership.

The doctrine in relation to such partnerships is well settled—and has not been controverted by the defendant's counsel. That in this description of partnerships, each and every member should be responsible for the whole debts of the company, is founded in reason and policy; and, required by the nature of trade, and the good faith necessary in commercial operations.

The same principle is recognized in our own code, but the very manner in which it is done, shews clearly that the principle is alone applicable to common commercial partnerships. After treating of the character and nature of special partnerships, the code proceeds to establish the rules applicable to ordinary commercial partnerships; and their special enumeration and application to this description of association, forbid the extension to any other. *Civ. Code*, 391, *art.* 11.

If, in the cause before the court, such ordinary commercial concerns between the defendant

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and the Natchez Steam Boat Company had been established. (which, however, having non-existence, has not been proved) then it has been already shewn, that the plea in abatement would be fatal to the plaintiff's action.

But let us examine the ground on which the plaintiff's counsel relies to maintain this action against the defendant as a member of an ordinary commercial partnership.

There is nothing in the covenant sued on, in the pleadings, or the evidence adduced, which goes to shew the existence of any such partnership, nor is there any thing in writing relied on to support the position, that the defendant was even a member of the company.

In the articles of covenant, the company is described as the Natchez Steam Boat Company, the defendant signs as chairman thereof; the character of the company, and the authority, by which the contract relied on was signed by the defendant as chairman, is alone to be found in the articles of association, the rules and regulations adopted for the government of the company, and the recorded resolves vesting the authority in the defendant to make the present contract.

Is there any thing to be found in these documents and proceedings, which shews that the company at Natchez were a common commer-

cial partnership? The idea of such association is wholly excluded from the very objects of the company, as well as the regulations defining these objects. The objects were the purchase of one or more steam boats, with a view to their navigation, relying upon the freight derivable from the transportation of merchandize of others, as indemnity for the funds thus invested.

And, in one case only, could even a purchase be made of any article, other than the boats, and, this case is expressly declared to be when scarcity of goods to be freighted for others rendered it necessary, heavy articles of goods in bulk were to be purchased, upon which, fair freight might be realised.

The members of the company were to become contributors, not of community of monies, effects or labour (as is essential to all commercial partnerships) but by subscribing for stock, and each member bound only for the amount of stock so subscribed in shares.

The company was associated in the mode by which all such companies are formed, previous to incorporation. In their formation and whole proceedings, they had a corporation in view. One of their first resolves was to petition their legislature for incorporation, and this was accordingly conferred.

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The appointment of a chairman, previous to incorporation, and, this was accordingly conferred.

The appointment of a chairman, previous to incorporation, to act as the agent of the company, was mere matter of form: they might just as well have called him president, or given him any other description as that of chairman.

Can any thing be more extravagant than the idea, that by virtue of his office of chairman, the defendant was to become liable for the whole debts which the company would create by their contracts; was such a liability contemplated by any one? Was such liability ever for a single moment held out to the plaintiff?

The company, too numerous to act together, created an agent, whom, they call chairman, not that he was to be ruined by the payment of the company's debts; but that he might, for them and on their account, contract and covenant to buy boats for them and for which they would pay.

It was contended, by the counsel for the defendant in argument, that the only case where one shall be deemed bound for the debt of another, without having expressly so bound himself, is to be found in the known and established relations of husband and wife, guardian

and ward, father and child, master and servant; and where the law itself points out the duties and prescribes the limits of the responsibilities, which attach to these various relations. This position is deemed undeniable; notwithstanding the depth of research displayed by the counsel for the plaintiff, no satisfactory answer was made to it. And in this case, unless it is shewn that the defendant comes within the principle, and by virtue of his office as chairman stands in that relation which the law has pointed out and made him expressly responsible, this action cannot be maintained against the defendant for a debt of the company, unless he has expressly so bound himself for their debt by the writing sued on, and in this case we shall search in vain for any covenant by which he is so bound.

And yet with these strong and admitted facts, these plain and uncontroverted principles of law before us, the counsel for the plaintiff, to maintain this action, require of the court, first, by inference and implication to establish (what never existed) a common commercial partnership in the Natchez Steam Boat Company; and, by the same equitable and just course of inference, secondly, to presume the defendant not only a member and partner, but, liable for the whole debt thus contracted by the company.

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and, this too, in violation of the covenant sued on, as well as the avowed intention and declarations of the contracting party.

In the argument of the cause, the counsel for the plaintiff seemed to differ, as to the character of the partnership formed by the Natchez Steam Boat Company.

It was contended by the counsel for the defendant, that, formed as the association was with the express view to incorporation, it should properly be considered, what is called in the commercial code, an anonymous partnership. In regard to which it is alledged that the anonymous partnership does not exist under a social name or firm, but is distinguished by the object of association. It is managed by agents or directors who are either stockholders, or not; that the directors are only responsible for the execution of the trust committed to them, nor do they contract in virtue of their administration any personal obligations, nor become jointly and severally responsible for the engagements of of the association. The association are liable only to the extent of the interest, that is, to the amount of their shares in the association, and they cannot exist without the authorization of government. *Commercial code, l. 1, t. 5, art.* 29—37.

It is relied on by the counsel for the plaintiff, that according to the commercial code of France, *art.* 31, referred to, this anonymous association can have no existence without the authorization of government. This cannot avail the plaintiff, and the more especially in the case before the court.

That the company at Natchez have a right to limit their association, and that they could lawfully appoint an agent with authority to make special contracts obligatory on the company:

And that the contracts so made with the full knowledge of the character of the association, furnished the contracting party, could only be enforced according to such limited liability, has been abundantly shewn.

Aware, however, of the inconvenience of making these special contracts, and of the benefits derivable from receiving the sanction of government, this company was formed with the declared view to such sanction, and at the earliest moment practicable, this sanction was obtained.

The only reason why the commercial code requires the sanction of government is, that the nature of the association should be made public, that there should not exist associations with special limited responsibilities hidden from society,

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and whereby impositions might be practised upon private individuals.

The principle found in the 37th article of the code, would not affect a contract made under the circumstances presented to the court in this case. Such a contract made with a company so associated, with the view to the sanction of government, and which sanction was actually conferred as contemplated, would be enforced in good faith according to the real intention of the contracting parties.

Can the plaintiff in this cause complain that he has been deceived by a secret association at Natchez, holding out false inducements, or feigned responsibilities :

That the defendant assumed the character of chairman and made himself individually liable by exceeding the bounds of his authority :

That the company, he contracted with, is not the solvent, good company represented to him?

On the contrary, the plaintiff acknowledges, that all the papers necessary to apprise him fully of the objects and character of the association, as well as their views to incorporation, were submitted to him previous to making the contract.

He had before him, in writing, the agency of the defendant, and his authority to purchase the

boats, as well as the price and terms the company had agreed to give. He had, furthermore, the names of the subscribers, with the amount of stock respectively subscribed by each, and the knowledge that no subscriber was bound to contribute more than the amount of stock so subscribed.

The statement of facts, made in the affidavit of Fisk is admitted, as having been duly proven, and therefore to be viewed as good testimony, subject to the legal exceptions taken by the plaintiff as to its admissibility; and, these facts, so far from being at all controverted, are admitted by the plaintiff to be true. What are these facts? "That the defendant, as chairman of the said company, proposed that the notes should be executed in the same manner, in which it was subsequently agreed they should be made, and as they were, thereafter, made in the case of the Orleans. That to this the plaintiff objected, and stated that he did not wish to look to the company for his money, and proposed to the defendant that he, together with two other members of the said company (Rutherford and Griswold) should sign the notes without any allusion, or reference to the company, as in this mode, he, the plaintiff would not be under

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the necessity of resorting to the company for payment, as he would have the personal security of the persons so executing the notes for the whole amount.

The defendant positively refused to do this, saying that he was not and would not become responsible in the concerns of the said company, beyond the amount of shares by him actually subscribed in the stock of said company; and that if the plaintiff was not satisfied with the security wich the subscription list of said company presented, and the recourse which he would have against the company, as then constituted, or against the several members composing it, all further negociation must cease.

We will here only premise that this testimony cannot be refused by the court as inadmissable, because, it neither inlarges, varies, contradicts or alters the contract sued on. It only goes to prove, that, according to the face of the contract, the defendant was contracting with the plaintiff in the character of chairman, as agent for the company; the contract to be made for their benefit and on their liability. And that the plaintiff not wishing to look to the company for his money, proposed to the defendant to inlarge his contract, to abandon his character as agent, and execute the notes with two others in

their individual characters, and thereby become personally bound, which the defendant positively refused. That the plaintiff ultimately accepted the contract, and agreed to accept the notes signed by the defendant in his character of chairman, as agent for the company, and as had been originally proposed and understood by the parties.

Why did the plaintiff state that he did not wish to look to the company for his money, and propose to the defendant to become individually bound, if he did not know, and it was not distinctly understood, that the contract, as proposed, was to be made purely as agent, and with the view solely to the liability of the company and not the defendant?

Thus we have the plaintiff's own positive declarations that he was treating with the defendant purely in the character of agent; that he was selling his boat to the company, and was to look alone to the company for payment, and that he proposed to make the contract individually binding, but which the defendant positively refused.

With these admissions of the plaintiff himself, can this court enforce this contract against the defendant, without violating as well the sound rules of interpretation as the evident and de-

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clared objects and meaning of the contracting parties.

If under circumstances like these, a decree can be had against the defendant in his individual character, it must be founded on principles of morality and law, totally different from those, which heretofore have received the sanction of this and other enlightened tribunals of justice.

In the case of *Krumbhaer* vs. *Ludeling*, after settling the principle that "a person acting avowedly as agent, is not liable personally for any act, legally done in his capacity as such," this court, after stating as a general rule, that "no parol evidence can be admitted to prove any contract different, from that made by the bill itself," say "but this rule does not preclude inquiring into the consideration, as in that case between the drawer and payee of a bill of exchange."

That was a case on a bill of exchange, signed by the drawer in his individual character, and to prove that the bill was drawn as an agent, and with the knowledge of the payee.

This parol testimony went to establish an agency, when the writing was signed as principal.

The parol testimony here offered to the court

only goes to shew that the defendant was applied to by the plaintiff, to go beyond his agency, to make a contract different from that which was made, and become individually bound, which the defendant refused.

In the case of *Krumbhaer* vs. *Ludeling*, the court say further, that the defendant is at liberty to shew a want of consideration, and any circumstances of fraud, or violation of good faith on the part of the plaintiff, which may be sufficient to exonerate him from his apparent liability; the suit against him being brought by a person "with whom he was immediately concerned in the negociation of the instrument."

The court then proceed. If, then, Ludeling shews that he was a mere agent throughout the whole of this transaction, and that within the knowledge of the plaintiff, the bill is not binding on him because he is not a party to the contract, and as it relates to him, it is without consideration; and the attempt on the part of the appellee to enforce it is a violation of that evident justice and good faith, which ought to direct and govern in all contracts.

The principles here settled by this court have not been complained of, nor will they be disturbed, until we are incapable of appreciating the

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evident justice and good faith which ought to direct and govern all contracts.

We only ask of the court to test the rights of the parties now before them by these principles, and the grounds for recovery by the plaintiff must be found elsewhere than in the good faith which marks his attempt in this action to seek individual liability in the defendant. 3 *Martin*, 644.

Thirdly. We will now consider the defence presented by the defendant's plea in bar to the plaintiff's action.

Under this plea, the ground relied on is, that the defendant executed no such covenant as is produced to support this action.

We have sought in vain for the defendant's liability as agent, or as member of a partnership either general or special. Let us see how far he has incurred individual liability, by any of the covenants contained in the writing sued on.

The plaintiff covenants to sell and convey to the Natchez Steam Boat Company, not to the defendant, that he will deliver the said boat to the Natchez Steam Boat Company, or its agent, not to the defendant; that at the time of the delivery to the said company, he will make a conveyance vesting title in the said company.

The chairman, board of directors and compa-

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ny covenant to pay therefor 65,000 dollars in the manner following, viz. 15,000 dollars in cash &c.

The company, not the defendant, covenant that at the time of payment of the 15,000 dollars they will execute their promissory notes to the plaintiff for the residue 50,000, and that they (the company) will execute to the plaintiff a deed of trust; and that the notes and deed of trust shall be executed and delivered by the chairman of the board of directors, in the name, and for, and on the behalf of said directors and company.

Not one single expression, in this whole writing can, by just rules of interpretation, be tortured into individual covenants on the part of the defendant. If any individual responsibility attached to the defendant, by signing this writing as chairman, it was not in the power of the company to discharge him therefrom. The same power which created the office of chairman, and conferred it on the defendant, could unquestionably have conferred it on another. Suppose, after signing this writing, the defendant had resigned as chairman, or been removed, and another elected, would not the defendant have been forthwith discharged even from the duties imposed on him as chairman? Clearly. After this instrument of writing had been prepared with

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all the covenants therein as they now stand, could not any other chairman of the company have signed them with equal propriety as well as the defendant? Most unquestionably.

This at once settles the question that there are no individual covenants of the defendant in the body of the writing, and that its execution as chairman, no matter by whom, was merely complying with the forms the company had adopted, by which they should become bound through their agent.

But, again, suppose Postlethwaite had brought an action, in his individual name, for this steam boat under this contract; could he have recovered her? Such an idea would be preposterous. If he could not recover the boat, shall he be made liable to pay for her, with no covenant on his part to do so, and in direct violation of the character in which he contracted—as well as the clear meaning and intent of the contracting parties.

The subtleties of learning never tire, when pressed to point out in this contract any one covenant, by which this action could be maintained against the defendant: the counsel for the plaintiff tell us, there is the defendant's private seal at the end of chairman. This magic, of a scrawl with a pen, has been on the wane

for some years; a number of the sister states, our own with others, have ventured to believe that a contract could be as well understood, and the objects and rights of the parties, enforced with as much justice, in the absence, as in the presence of this mysterious wax, or scrawl.

The authority (if any was wanting) quoted by the defendant, is on this point conclusive. This case is found in Johnson's Reports, where on an instrument for payment of money executed in Virginia with an L.S. which in Virginia is held a sealed instrument but made payable in New-York was held to be governed by the laws of New-York, and to be a simple contract. *Warren* vs. *Lynch*, 5 *Johns.* 239. Lest, however, this ground should be untenable, the plaintiff's counsel say, the defendant is liable, because in actions *in solido*, the creditor may apply to any one of the debtors he pleases, and refer us to the *Civ. Code*, 278, *art.* 103, & 1 *Poth. Obl. n.* 270.

This is admitted as very sound law by the defendant, but in the same books it is also declared, that an obligation *in solido*, is not presumed, it must be expressly stipulated. There is no obligation *in solido* expressed in the writing sued on—nor is there even ground to presume it,

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if presumptions could be indulged. 1 *Pothier Obl.* *n.* 265, 267, 241, 243, *Civ. Code*, 278 *art.* 102.

There being nothing in this contract, which could bind the defendant *in solido*; then, say the counsel for the plaintiff, he is bound by having signed it merely in his character of agent. And to support this novel position we are referred to 4 *Mass. Rep.* 148, 5 *East*, 148, 8 *Mass*, 595. 1 *John. Cas.* 319, 9 *John.* 334.

By examining these cases they will be found inapplicable, and to fall far short of establishing the defendant's liability in the action.

Parsons says, "the decision of this cause must depend on the construction of the deed. If the defendants have by their deed, personally undertaken to pay, they must be holden." 4. *Mass. R.* 597.

In that case too, the contract was made by agents, appointed by the directors who were agents, and it did not appear that the company had given the directors, its immediate agents, power to substitute other agents, by whose contracts the company should be bound; and, the judge said, that not appearing, he would not presume it, without some evidence.

The case from 5 *East*, 145, is of the same character, and was a case, where one bound himself, his heirs, &c. not as agent but for the

performance of another. And the other cases bear the same aspect, and will be found to have covenants in their nature individual, or cases failing to shew the real character of the agency, or those who might have been sued as principals.

It would require a very different class of cases from these to induce this court to unsettle all the principles they have so often and so long sanctioned as to the liability of an agent, as well as disregard the provisions of our own code which declare that the covenants by which the defendant is to become bound in this case must be expressly stipulated, not inferred.

In no view, which we can take of this contract, does there appear sufficient legal ground to enforce it against the defendant. Should, however, the court differ from us, and be disposed to attach any legal responsibility to the defendant, then is properly presented for consideration

The fourth ground of defence, to wit: That by false and fraudulent artifices and misrepresentations, the plaintiff induced the company to purchase the boat, for a full and fair price, under assurances that she was in all respects, a sound, substantial, fine boat; when, in fact, the said boat was rotten and defective, and that the

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plaintiff had wholly failed to deliver said boat, at New-Orleans, in good order, according to the tenour and true spirit of said contract.

The counsel for the defendant offered parol evidence, to prove the impositions practised by the plaintiff as to his representations, &c. concerning the boat, but which was objected to by the plaintiff's counsel upon several grounds, and amongst others, that there was no allegation of fraud in the pleadings.

This is rather a singular ground to take in this court, open as are all its avenues to justice, unshackled by the subtleties of special pleading.

We had supposed, that our allegation, of fraud, in the case, would have satisfied a court, influenced alone by the rules of common law pleading.

After going on and reciting in our plea the various representations, and inducements held out to the company to purchase; and alledging the readiness of the company to receive, if the plaintiff was ready to deliver, a sound substantial boat, such as he represented the Vesuvius to be, but, that the said Jasper Lynch, not regarding his obligations to deliver the said steam boat Vesuvius to the said company, refused so to do; he, said plaintiff, falsely and untruly alledging that the said company were bound to

receive said boat, whether in good order and sound or substantial, or not.

If to alledge the plaintiff made certain covenants and representations which he wholly disregarded, falsely and untruly alledging pretexts therefor, is not an allegation of fraud suited to the views of the plaintiff's counsel, it is sufficiently so to reach the mind of this enlightened tribunal seeking the purposes of justice rather than the restrictions which deny it.

This allegation would permit parol proof to support it, by the strictest rules of pleading found in common law courts. Here no allegation would be necessary, but the court would receive the proof under the general issue.

A great variety of cases have been quoted from common law books to shew under what circumstances parol evidence can be properly admitted to vary, or explain a written instrument. It will be received in all cases to prove circumstances tending to shew fraud or imposition, in all cases where words are used ambiguous in their import, and the explanation of which is necessary to the just exposition of the contract; in all cases where the parol evidence will not vary, enlarge, alter or contradict the writing; but where it goes to explain doubts which arise, as to the real object and intention of the contracting parties.

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In a great variety of cases, at common law, has parol evidence been admitted to alter and contradict the writing, and this too, where there has been no allegation of fraud or imposition. The parol testimony offered by the defendant's counsel, must be received under either or all the rules laid down. In regard however to the rules of evidence, they are in themselves entirely arbitrary; growing out of no fixed principles, but finding their origin in a great variety of cases in the books as each respective case presented some new feature. And Fonblanque is well justified in the idea, that there is perhaps no rule of evidence, except that the best testimony in the power of the party shall be admitted.

The case before the court, may be most properly viewed as a bill in equity, seeking specific performance; and the counsel for the plaintiff found themselves wholly at a loss to avoid the conclusive authority from *Phillips*, in page 449, where the author after taking a clear and comprehensive view of the subject, lays it down as settled: when a court of equity is called on to decree specific performance, there the party to be charged is admitted to shew that under the circumstances the plaintiff is not entitled to have the agreement specifically performed. The ad-

mission of such evidence as matter of defence is very frequent; it is used to rebut an equity. The agreement you seek, says the defendant, is not the agreement I meant to perform; and then he is admitted to prove fraud or mistake. The same author, page 450 says; the general principle appears to be, that in answer to a bill for specific performance, the defendant may suggest and give parol evidence upon the ground of, fraud, surprise or mistake.

The counsel for the defendant might, however, with the most perfect confidence yield all the benefits derivable from the common law authorities, and safely rely on having the admission of the parol testimony offered by them tested by the rules laid down in 3 *Martin*, where after recognizing the general principle, that parol evidence cannot be admitted to prove any contract different from that made by the bill; the court further say, that this rule does not prevent inquiring into the consideration, and the party is at liberty to shew a want of consideration, or any circumstances of fraud or violation of good faith on the part of the plaintiff.

The parol testimony offered by the defendant is not to prove a contract different from the one relied on, but to prove a want or failure of consideration; to prove that the boat, which was

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the only consideration with the company, was represented and purchased as a sound good boat, when in fact she was decayed and rotten, so as greatly to reduce her value. To prove that her defects are so great, that had they been known to the company, so far from giving the full and fair price of 65,000 dollars they would not have purchased the boat at all.

To reject this testimony is to unsettle the principles sanctioned by our own, as well as the common law, authorities, and close the door on facts essential to a just and equitable interpretation of the contract, really intended by the contracting parties. *Powel on cont.* 426, 484. 3 *Term Rep.* 474, *Call. Rep.* 5, 1 *Dall.* 198, 426, 3 *Dall.* 506, 1 *Binney* 587, *N. York T. R.* 232, 9 *Cranch* 36, 37, *Peake's evid.* 97, 12 *East.* 399, 5 *John.* 284, 9 *Johnsons Rep.* 385. *Phill. Ev.* 416, 443, 448, 455, 3 *Martin*, 640.

If we are asked for the evidences of fraud, or want of good faith in this transaction on the part of the plaintiff, we need only call the attention of the court to various inducements held out in his letters, as to priviledges and benefits the company would secure by purchasing from him, priviledges and benefits, which he had not and could not guarrantee. In his letter

he does not only speak of these very privileges, but gives the company a solemn warning by which to deter them from purchasing other boats. In the same letter, the plaintiff also speaks of his desire to "evince a spirit of candour, and openness of dealing with the company." In other parts of the record, the plaintiff is found urging the defendant to become individually bound for the debt of the company, which he positively refused; and the plaintiff ultimately with concealed and feigned views, as he himself acknowledges, received the contract for and on account of the company, in the manner proposed by the defendant. The plaintiff attempts to justify this conduct by the facts, stated in his affidavit and found in several parts of the record.

The ground, relied on for justification, is that before he received the contract of the defendant as chairman, he consulted counsel and examined authorities, and satisfied himself that the defendant would be individually bound for the debt, notwithstanding he was contracting as agent or chairman for and on account of the company.

The plaintiff, however, took especial good care to conceal from the defendant the new views of individual responsibility, obtained by his le-

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gal researches, and actually received the contract, not only with the full belief of the defendant that the plaintiff was satisfied to look to the company, but with the express declaration by the defendant that he was not and would not become responsible for the company; and that before he would incur the obligations, now attempted to be enforced against him, all further negociation with the plaintiff must cease.

Fraud is defined by the books to be "the artifices by which one man deceives another." To say the defendant was not deceived by the plaintiff, in the manner in which this contract was obtained, would be to contradict the plaintiff's own affidavit, on which he relies for his justification.

If fraud be too harsh an appellation for thus deceptiously obtaining from another a contract incurring (as the plaintiff now pretends) not only greater responsibility than the party believed, but, which he declared he had not and would not incur, and that he would not even negociate with the plaintiff with such views, it will answer the purposes of justice to inquire whether this conduct was in the "spirit of that candour and openness of dealing" previously professed by the defendant. Was it sanctioned by that good faith which must direct and govern all con-

tracts, and which is essential to give that equitable character to the plaintiff in which he must appear, before he can ask equity of another? Was it good faith to sell a boat, representing her to be a fine sound substantial boat, by which he obtained a full and fair price, and tender a boat essentially defective and rotten? Is this the good faith which is to find favor with a tribunal, whose peculiar pride is the universal principle of right and justice it enforces?

Much of the time of this court has been occupied, not in proving that this is the sound, good boat purchased by the company, but, in proving how much she is rotten and defective. All the witnesses agree in proving her most essentially defective: and, trace the counsel for the plaintiff to the last alternative of the many, resorted to for pretexts of recovery, and you find them making laborious calculations, not to prove the boat such as was represented, and covenanted, but to prove that she is only rotten to the value of some 10 or 15,000 dollars, when the court below has determined, that the testimony sanctions a dimunition from her price of 25,000 dollars.

When the plaintiff's counsel respond to the deceptions used, by which this contract was obtained, we are told that the plaintiff only over-

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reached the defendant in his legal researches; and much learning both from the living and dead languages is pressed on us to prove, that our ignorance of law will not excuse us. We should be wanting in a proper regard to the understanding of this court, to occupy them in shewing the difference between ignorance of law, and the deceptive manner in which the plaintiff induced this contract from the defendant. Without wading through the long list of authorities quoted by the plaintiff's counsel on this subject, we deem it only necessary to call the attention of the court to the principles which are applicable to the cause before them.

Fonblanque, certainly amongst the best authorities from the common law books, and peculiarly entitled to be relied on for his able equity treatise, declares an impediment to the execution of a contract to be ignorance and error; either in fact, or in law: and if the mistake be discovered before any step is taken towards performance, it is but just he should have the liberty to retract.

The same author refers to the rules of the civil law "that there is no consent, where there is error;" and says in the application of this rule, it is material to distinguish error in circumstances which do not influence the contract,

and error in circumstances which induce the contract.

Apply these rules, whether as to ignorance of law, or fact, and they secure the defendant against a recovery.

Even if the defendant became legally bound by signing this contract (which, however, we trust has been clearly shewn he did not) still his error that he was so binding himself, coupled with the positive declarations, that he was not and would not become so bound; and the admitted concealed views of the plaintiff, when he obtained this contract, notwithstanding his previous professions of candour and openness of dealing, would clearly bring the defendant in the rule as to ignorance of law.

Is not consent an ingredient indispensable to to all contracts; did the defendant ever consent to become legally bound? Can the court for a moment believe that the plaintiff would have obtained this contract from the defendant, if he had entertained the most remote idea that the law would attach, or, the plaintiff would ever have sought to make him individually responsible?

Was not the defendant induced to sign this contract, purely from the belief the plaintiff

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would look to and seek the company and not the defendant under the contract?

If then he has legally erred, and this error would have influenced him not to make the contract, had he been undeceived at the time, according to Fonblanque and the authorities to which he refers, this error of law shall excuse him and the contract be vacated.

Again, as to error in fact, can any rational mind, for a moment, doubt that the defendant was in an error as to the real situation of this boat?

It has been abundantly proved (and the testimony cannot be rejected, by the rules already established in 3 *Martin*, for it only goes to the consideration and not to alter the contract) that 65,000 dollars was at the time of the purchase a full and fair price for the Vesuvius, even if she had been in all respects a perfectly sound and good boat.

And, yet, the witnesses vary from $15,000 to 25,000 as to the loss which the company would sustain by making her, what they believed they were purchasing, a sound, good boat.

Even the plaintiff's own examiners and reporters declare that on the larboard side a majority of her old timbers are defective. Other witnesses state that one fourth or one third of

all the lower or middle and important timbers are not defective only, but rotten.

What! Give the fullest price for the best boat on the river, and tender a boat thus rotten and defective, $25,000 of less value than you believed her to be at the time of purchase, and yet not be in an error?

Instead of this being the best boat on the river, an able and experienced builder and master of vessels, and whose character for integrity was proven to be wholly unimpeachable, (A. Seguin) swears that there are five classes of vessels, and that, was he called on to class the Vesuvius, in her present condition for the river trade, he would place her in the last, or fifth class. And, yet in the great variety of expedients which talent and ingenuity bring to the aid of a hopeless cause, we are told that it is no error which would have influenced the parties in making the contract, or, which should influence the court in enforcing the rights growing out of it.

Had the defective and rotten condition of this boat been known to the company, can the most incredulous mind believe, that it would not only have influenced them in the price they gave, but would have deterred them from purchasing altogether? On this subject Fonblanque refers to

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Pothier on obligations with this remark, "to which I am happy to refer, it appearing to me to afford the best illustration of the principles and conditions of contracts."

Previous to examining the principles to which he refers in Pothier and which are sanctioned by Domat and other able civilians, we would remark that Fonblanque is supported by authority from American reporters. 1 *Fonblanque*, 115 & *note*. 1 *Hennen & Mumford*, 429.

In regard to error and the objects to which it relates, it is wholly unimportant whether it be produced by fraud, or from any other cause. It is sufficient that error exists, and that it is error, whether of law or of fact, which might fairly be considered as influencing, or inducing the parties to contract, or abstain from contracting had they been undeceived in their error, or which would have influenced them in the price they contemplated to give for the subject of purchase.

As to the case before the court, therefore, it is only necessary to shew that the defendant was in an error as to the extent of the liability he supposed he was giving, (if in fact he gave any) or, that he was in error as regarded the soundness and good condition of the boat. And

it is expressly declared by the civil law authorities, that it is immaterial whether the defects in the article sold were known to the seller or not; it is sufficient that they do exist, and that the article sold proves different from what the purchaser believed, and that the difference is such as might have influenced him in the price at the time of purchase.

Let us now resort to the sources from whence Fonblanque found himself happy in deriving information, and we shall have cause to regret our inability to the just application of the sound principles of justice, if this court cannot find abundant matter to annul and vacate this contract; a contract, to say the least, in bad faith obtained, and attempted to be enforced.

"Error is the greatest defect that can occur in a contract, for, agreements can only be formed by the consent of the parties, and there is no consent where the parties are in an error respecting the object of the agreement." *Pothier, Obl. n.* 17.

"Error annuls the agreement, not only where it affects the identity of the subject, but also where it affects that quality of it, which the parties have principally in contemplation, and which makes the substance of it." *Id. n.* 18.

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"A contract has no effect except with regard to things which are the object of the agreement, and as to the contracting parties." *Id. n.* 89.

"The agreement being formed by the intention of the contracting parties, can have no effect except with regard to what those parties intended and had in view." *Id. n.* 86.

"Since people buy things only to employ them to the uses for which they are destined, this is a fourth engagement, which the seller is under to the buyer, to take back the thing sold, if it has such faults and defects as render it unfit for its use, or too troublesome; or to diminish the price of the thing, whether the defects were known to the sellor or not, and if he knows them he is obliged to declare them." *Domat.* 1, 2, *s.* 2, *art.* 4.

"Since it is not possible to restrain all the perfidious dealings of sellers, and that the inconveniences would be too great to dissolve or call in question sales for all manner of defects in the thing sold, we consider only, therefore, those defects which render the things altogether unfit for the use for which they are bought and sold, or which diminish that use in such a manner, or render it so inconvenient, that if they had been known to the buyer, he would have

either not bought them at all, or at least not given so great a price for them."

"Although the defects of the thing sold were unknown to the seller, yet the buyer may procure a dissolution of the sale, or an abatement of the price, if the defects are such as give occasion for it; for, since people buy a thing only for its use, if it chance to have any defect, which hinders this use or lessens it, the seller ought not to reap the advantage of an apparent value, which the thing sold seemed to have, yet had not." *Id. art.* 5.

"In the same case, where the defects of the thing sold were unknown to the seller, he shall be bound not only to take back the thing or abate the price, but likewise to indemnify the buyer, as to the charges, which the sale has put him to." *Id. art.* 6.

"If the seller has declared the thing sold to have some other quality, besides those which he is bound to warrant naturally, and that quality happens to be wanting, or that even the thing sold happens to have the contrary defects, we ought to judge of the effect of this declaration of the seller, by the circumstances of the consequence of the qualities which he has expressed; of the knowledge which he might, or ought to, have of the truth, contrary to what he has said;

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of the manner in which he engaged the buyer; and above all, to enquire whether these qualities have made a condition, without which the sale would not have been concluded; and according to these circumstances, either the sale shall be dissolved or the price diminished." *Id. art.* 13.

"The seller is obliged to explain clearly and distinctly, which is the thing that is sold, in what it consists, its qualities, its defects, and every thing that may give occasion to any error, or misunderstanding; and if there is in his words any ambiguity, obscurity or other defect, they are to be interpreted against him." *Id. art.* 14.

Notwithstanding the great efforts made by the plaintiff's counsel to prevent the defendant deriving any benefit, by resorting to the rules of the common law for the admission of parol evidence, to explain doubts which might arise as to the real objects and intention of the parties; yet, when called on to account for the rotten condition of the boat, they say the plaintiff has only covenanted to deliver this boat in "good order"; and good order being mere technical terms, they contended for the right to introduce parol testimony to prove what good order means; and a number of their witnesses were examined as to the import of these words.

The counsel for the plaintiff contended, that good order, as to a vessel, means her fitness to perform a voyage; and relied with great apparent confidence, that if the Vesuvius was in a situation to perform a voyage the plaintiff had complied with his contract, and the company were bound to receive her.

This is, perhaps, the first instance in which this court has been seriously called on to confine its views to mere terms of technicality, by which to enforce these broad and universal principles of equity, which heretofore have received their sanction.

Is there any thing in the term good order, which should induce a belief that the company at Natchez intended thereby only to purchase a boat capable of performing merely a voyage, or being only a safe boat for two years?

If the words good order had not been inserted in the writing, according to the rules laid down in 3 *Martin*, parol testimony would be received to go into the consideration.

The sole consideration with the company was the boat, and any proof to shew that she was rotten or defective, in whole or in part, would therefore be good. Shall the defendant be placed in a worse situation by the insertion of these words?

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But the absurdity of this attempt to shackle us with technicalities is abundantly evinced by the singular character of the testimony relied on to support them. Some of the witnesses depose that a boat may be essentially rotten (one witness goes so far as to say, two thirds of her important timbers) and yet be in good order.

Another witness, captain Rinker, whose experience and character guarrantee the fullest confidence, deposes that a vessel having material timbers defective or rotten, cannot be considered in good order.

Watson, a merchant of high standing, deposes to the same effect.

We have abundantly proven the Vesuvius to be most essentially rotten and defective, and, therefore, according to this testimony, not in good order, and, not being in good order, the company was not bound to receive her, nor can they be compelled to do so.

If this testimony as to the force and meaning of these words is to be used by the plaintiff, surely with equal force must it avail the defendant, if the court find any necessity to travel out of this writing to get at the real meaning of the parties, for that is, at last, the end and object of all contracts, and the golden rule by which they are to be interpreted and enforced.

There is a much more solid basis on which to rely, than the various, contradictory opinions of the witnesses as to the meaning of technical words.

We have proven that the defendant represented and covenanted to sell, and the company believed that they were buying, in all respects, a sound, substantial boat, the best on the river, and for which they agreed upon a full and sound price: and instead of the boat answering the description, she is proven greatly defective and rotten, and far from being the first, A. Seguin proves her only worthy of being ranked with the last class of vessels.

When commodore Patterson, a witness on whom the plaintiff's counsel places great reliance, for the technical meaning of good order, is asked, if he would deem a vessel in good order which he had been promised for convoy and represented as a fine substantial vessel, the best from whence she sailed, and the vessel, upon examination, turned out to be essentially defective, having important timbers rotten, and only to be ranked in the fifth or last class of vessels. He answers, that he should consider himself deceived and imposed upon, by those who made him the representation.

It does appear to us that this testimony goes

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rather more to the merits of the cause, than different opinions of different witnesses as to the force of technical terms.

That the company have been deceived and imposed upon by the representations as to the real character and condition of this boat (and whether the plaintiff intended to deceive him or not is wholly immaterial) cannot be denied without disregarding entirely the testimony. If to be deceived and imposed on entitle suitors to relief from this court, a decree cannot be had against the defendant in this cause. If the court should find any difficulty in resorting to parol testimony to establish the representations of the plaintiff as to this being a sound boat; the defendant finds himself amply protected in the implied warranty which the law attaches, and that a sound price requires a sound article.

The plaintiff's counsel in the course of the argument were pleased to treat this principle of law with great apparent indifference, speaking of it as only to be founded in the extravagant notions of Professor Woodeson and Doctor Cooper. It is not a very difficult task to avoid the force of a principle, not by proving it morally wrong in itself, but by attacking those who maintain it.

In the ability displayed in the argument of

the cause by the counsel for the plaintiff, we had a right to expect elucidation of principle rather than denunciation of authority.

It was not, at all events, to be expected, that the books, containing the favorite principles relied on by them to support the action, would have been denounced as containing extravagant notions.

Justice Blackstone, for whom some veneration is entertained by the devotees for the commercial law, in treating the subject of warranty says, "but the vendor is not bound to answer unless he expressly warrants the effects sold to be sound and good, or unless he knew them to be otherwise and hath used any art to disguise them, or unless they turn out to be different from what he represents them to the buyer."

It will hardly be contended that the Vesuvius has not turned out differently from what she was represented to the company. So that our case comes within this "extravagant notion" of Justice Blackstone. 2 *Black.* 450, 451.

Professor Woodeson, if not with the same splendor of reputation which Blackstone enjoyed, followed in his wake, and might fairly be considered as deriving all the benefits of the light shed upon the course of his predecessor.

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In treating of warranty he says, "in the English law relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded by the words, '*Caveat Emptor*,' signifying that it was the business of the buyer to be upon his guard, and that he must abide the loss of any imprudent purchase, unless the goodness and soundness of the things sold are warranted by the seller. However, it is now exploded, and a more reasonable principle has succeeded, that a fair price implies a warranty, and that a man is not supposed in the contract of sale to part with his money, without expecting an adequate compensation." 2 *Woodeson*, 415.

"But to come nearer home, in South-Carolina it has been determined as a good general rule "that a sound price warrants a sound commodity." 2 *Bay*, 380.

Some of the writers of common law seem disposed to confine this doctrine to horses. In the name of reason, why should not the maxim be universal? Is there any thing in the character of horses, which consecrates the principle? If just in regard to them, would it be unjust in regard to the hidden defects of a steam boat? This position is well examined in Brown's Civil Law, where he justly observes, that on this sub-

ject the civil law demands a manifest preference (over the common law) in obliging the seller not only to warrant the title, but to warrant the goodness of the commodity. 1 *Brown's Civil Law*, 368 & *note* 16.

In Sugden's law of vendors is also found the rule, that vendors are bound to warrant both the title and estate against all defects, whether they were or were not cognizant of them.

Domat and Potbier sanction the same principle. Judge Cooper, alike distinguished for the variety and extent of his scientific and literary acquirements, (but whose "extravagant notions of equity" do not suit the views of the plaintiff's counsel in this cause) in his commentaries on the civil law, gives his warm sanction to the principle that "a sound price warrants a sound commodity."

In treating of this subject, the same author brings into view authorities from the common law in opposition to this principle, and then proceeds: "this seems to me a most demoralizing principle of decision. I know of no argument that can be adduced to prove that if I give $100 for a commodity that ought to be worth $100, I am not defrauded if it be worth only ten. You say the seller knows nothing of it. My answer is, that before he took $100

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from me, he ought to have known that the thing he pretended to sell was reasonably worth that price. Generally the buyer relies on the seller, nor can the buyer cheat the seller; whereas the seller (under the common law rule) in nine instances of ten, may cheat his buyer with impunity. The rule of *caveat emptor*, ought to be changed into *caveat venditor*. It is a disgrace to the law that such a maxim (as that contended for as the common law rule) should be adopted, and I rejoice to see the good sense of the South-Carolina bench has revolted at it." Judge Cooper proceeds to say that the chancery cases in support of this rule (and which contain the doctrine contended for by the plaintiff's counsel,) ought to be classed as cases of fraud and falsehood. *Cooper's Justinian*, 609, 10, 11, *and authorities there quoted*. 2 *Bay*, 380. *Sugden's law of vendors*, 1 & 2. It is not to be wondered at that the counsel for the plaintiff should manifest some aversion to the principles contended for by Judge Cooper and other civilians. Apply them to the case before the court, and their only hope of recovery is gone.

It has been attempted by argument, (for it is not to be found in the testimony) to impress the court with the belief, that the doctrine of

warranty should not avail the defendant or the company, because they were fully apprised of the defects of the boat at Natchez.

So far from this being the fact, the boat was loaded at Natchez and could not be examined, and the gentlemen, on board with the defendant, did not pretend, for they could not, to take any other than a mere cursory survey.

All that passed while they were on board was calculated to make them believe that the boat was sound, substantial, and the best boat on the river. The plaintiff spoke of the great strength of the boat, pointed to the new beams he had put in to strengthen her, that she was the best boat on the river, that she had been rebuilt, (not repaired) under the plaintiff's immediate direction and superintendance.

Relying on the representation of the plaintiff as to the soundness and good condition of the boat, one of the gentlemen on board, in company with the defendant, observed to the plaintiff, that they supposed the timbers which they could not see, were all as sound as those they could, but the witness did not hear the reply from the plaintiff. See the deposition of Grimth.

Is it upon this testimony, that the court can find grounds on which not only to disregard the legal principles, which would compel the plain-

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tiff to give a sound article for a sound price, but to enforce a contract, clearly not entitled to the peculiar sympathies of the court, by which it is to be taken out of the uniform rules of interpretation and equitable enforcement of rights heretofore secured to the suitors?

In regard to the actual condition of the boat, the number of witnesses and the delusive nature of the testimony, render a more particular examination necessary, than is found in the preceding pages.

The nature of this examination is such as to produce occasional repetition in adverting to particular statements of facts; a necessity which will find an ample apology in the importance of the cause under consideration.

We will consider next the objections to the condition, soundness, and good order of the boat under the three aspects exhibited by the counsel of the plaintiff, viz. 1. As to the head beam of the engine; 2. As to the boiler; and 3. As to the hull.

First—As to the head beam. With respect to the character and situation of this part of the machinery, there is neither doubt nor difficulty: if the head beam be wanting, or if it be unfit for service, the rest of the machinery is useless. That the beam of the Vesuvius was broken, in

ferior, and comparatively worthless is admitted on all hands; and we have the authority of captain Gale, an experienced and skilful master of steam boats on the Mississippi, that there is great risk in attempting a voyage with a beam so broken, so much so as to risk not only the loss of the voyage, but the loss of the boat and cargo. Yet we are told that the steam boat Vesuvius, tendered to the Natchez Steam Boat Company in this situation, was tendered in good order, and that under the contract we were bound to receive her! What! The pride of the Mississippi, the *ne plus ultra* of steam boats, not in a condition to make a voyage, without danger of losing herself and her cargo, and yet in a condition to meet those lofty assurances and protestations, and to answer to a warranty of good order! The force of this objection is perceived by the counsel of the plaintiff, and it is attempted to be combatted on the grounds—1. that a new beam had been ordered from New-York, and 2. that there was a formal waiver by the defendant of all objections to the old one.

To the first apology it is sufficient to answer, that the new beam was not presented to us. We might confide in the declaration of the plaintiff that it had been ordered from New-York. We might believe it was on the ocean, that the

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was on the river, or at the levee; but we knew that its local being, or being at all, was not known. We saw that it did not constitute a part of that machinery, to the sufficiency of which the plaintiff knew and acknowledged to be essential. But the new beam did arrive, and that, says the plaintiff's counsel, is a conclusive answer to all objections. And when did it arrive? To this point we have the testimony of the plaintiff's witness, Pennistan, that the iron beam arrived and replaced the old one in the Vesuvius about the 24th of March; that is thirty-three days after the date at which the plaintiff declared the Vesuvius ready for delivery under the agreement, and from which time he claims our obligation to receive her, and twenty-two days after the institution of this suit to enforce that claim. The plaintiff's counsel, with his usual accuracy, says the beam was on board the boat "when the trial commenced in the court below." This is entirely unwarranted of the fact. Is it not clear, then, that there is no connexion between our right to require, on the 19th February, a steam-boat with her machinery in good order, and the question arising from New-York of a load before absolutely necessary to constitute such order, the arrival of which was remote and uncertain, and which

did not in fact take place until more than a month after, and of which we had no notice or information until it appeared in evidence on the trial of this cause; and it is not equally clear that the defendant (on the strength of this objection alone, if no other existed) was justified in saying to the plaintiff, in his letter of the 27th of February, that "we (himself and colleagues acting for the Natchez Steam Boat Company) do not feel authorized to receive, and must decline receiving, the said boat under the agreement of the 5th of November, 1818, as we do not find her in the state of soundness, and fitness for service which that agreement requires." But we are informed by the plaintiff's counsel, secondly, that we have admitted performance as to the head beam, and cannot now object to its condition. Two cases are referred to of decisions in New-York, where the time of performing a contract was enlarged and proven by parol. Being, as the court says, "a simple contract, 1 *John. Ca.* 22. it was competent, by parol, to enlarge, &c." and proof of a positive agreement to enlarge was given. We will not retort upon the counsel of the plaintiff his notions as to specialties, nor take shelter behind the crowd of common law decisions sustaining the principle,

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"that there cannot be a defeasance or waiver of any condition of an instrument under seal other than by an instrument of equal dignity." We will be satisfied with referring to the record for this "admission of performance," and see how far it goes to support the plaintiff's pretensions with respect to it. The witness of the plaintiff, Griffith, says, "that the plaintiff shewed the defendant the head beam, and mentioned that it was the only thing defective about the engine, and that the plaintiff had ordered a new beam from New-York." The defendant replied, that "he did not know that would make any difference, if the engine was otherwise in good order."

Straightened indeed must the counsel have been for ground to stand upon, when he resorted to this casual and qualified language to find a formal and operative waiver of an important condition in an agreement! 2. As to the boiler. Of the very great inferiority of this important part of the boat, we have the concurring testimony of every witness examined. It is old, has given way in several places, may last for twelve months, but is at present too weak to supply steam for the engine. In fact, as to this part of the boat, it may be said, without exaggeration, that the Vesuvius is as if she had no boiler. But it is alledged that the defendant was

fully informed upon this subject; an allegation unsupported by any evidence. The testimony of Griffith, relied on to this point, entirely fails to establish it. But whether or not, the statement of Griffith can be brought home to the defendant, this is certain, that the plaintiff stipulated to deliver a boiler in good order, and it is equally certain that he failed to do so, except in the particulars of oil and lampblack to conceal the defects, and of paint to exhibit an imposing exterior. On these two points, then, we have the most conclusive testimony—testimony which no subterfuge can elude, nor any ingenuity pervert. First. That the machinery of the steam boat Vesuvius, on the 19th of February, 1819, and thence to the 24th of March, was unfit for the purposes of navigation; and secondly, that if the machinery had been in order, the boiler was, on the said 19th of February, and ever since has been, incapable of supplying it with steam.

We are now to proceed to the consideration, thirdly, of the hull of the boat. On this point, the plaintiff's counsel refers to the report, *ante*, 80. It may be proper to remark that we have excepted to the admissibility of this report as testimony: it is not sworn to, it was not made under any judicial direction, and the par-

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ties to it were nearly all present in court. As it is upon the record, however, it may be proper to remark upon it. The signers of the report are, Allen Gorham, William C. Withers, Charles K. Lawrence, H. Harding and Andre Seguin—the three first named were selected by the plaintiff, under an agreement between him and the defendant, to select carpenters, and, of course, indifferent persons, to examine and report on the condition of the Vesuvius. That is, Gorham, who built the boat, Withers who afterwards put in her machinery, and Lawrence, who was in the employment of the plaintiff, as master of the Orleans for some years previously to her sale. Harding and Segnin, the only examiners of the five really disinterested, were chosen by the defendant. Of these five, only Gorham, Withers and Seguin, were examined on the trial below. Harding was absent, and when we offered to introduce Lawrence, the plaintiff objected on the score of his being a stockholder of the Natchez Steam Boat Company, and the objection prevailed; now it is manifest, that the feelings and propensities of Gorham, as well as his interest and character, went necessarily to shew the condition of the boat to be good: it is stated moreover by Seguin, that he never before, in his long experience, knew an instance of the

builder of a vessel being one of the persons making a survey or examination of her. The character of Gorham's testimony marks strongly his predilections; it is partial, involved and inconsistent. William C. Withers, another of the examiners of the plaintiff, confesses that he knew nothing of the state of the boat, but was guided more by the opinion of the other examiners than by his own judgment. The only important fact disclosed by this witness is, that, in his opinion, the Vesuvius was in better order than the Orleans, because he knew the Orleans was rotten twelve months before she was sold, Seguin was then in truth the only skilful and disinterested party to the report who examined at the time. This is stated from a conviction of its truth, and not from any belief that in the absence of his testimony the efforts of the plaintiff to establish the good order of his boat could succeed.

The steam boat Vesuvius was described to the Natchez Steam Boat Company by the plaintiff as a fine, strong, substantial boat, the best boat on the river; a boat, in fine, of which "the character was too well known to need comment." This boat was described, moreover, as having been rebuilt, and launched on the 1st of January, 1817, that is one year and ten months pre-

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cisely. At the time this description was made, the boat had a full cargo on board, bound from New-Orleans for Louisville, Kentucky; she stopped at the port of Natchez for part of a day, under circumstances which gave the purchasers no chance of examining or discovering any latent defects. We find that a committee of the company went on board of her, that the plaintiff pointed out to them in the engine room, as indicative of her strength and the substantial manner in which she was built, the magnitude of her timbers there in view; but on one of this committee stating to the plaintiff that he supposed the other parts of the boat were as sound and substantial as those which they had an opportunity of examining, the plaintiff walked to another part of the boat, and the witness did not hear his reply. What that reply was, and what it was not, we can satisfactorily determine from the ordinary characteristicks of this transaction.

In addition to this brief notice of the evidence, as it relates to the representations of the plaintiff, to the impossibility of the purchasers discovering the latent defects of the property, and to their diligence to that end; it may be necessary only to remark, that the Vesuvius was to be delivered in "good order" and in the same manner as in the case of the Orleans. We will

consider, first, how far the boat, at the time of proffered delivery, answered to the description of a fine, sound substantial boat, the best boat on the river, the *ne plus ultra*, &c. Upon this head the evidence is clear and distinct: the Vesuvius was not only not the Paragon thus described, but was inferior even to boats of ordinary pretensions. The defectiveness and rottenness of her hull were such, that if a sea vessel, decayed to the same extent, she would have been condemned: and although she might engage in the river trade, and run, in the absence of accidents with comparative security, for two years, yet if another boat could be found, the witness would prefer that other for the transportation of his merchandize or himself. We find, moreover, that if tested by the rules governing insurance that this *ne plus ultra* would be classed in the 5th or most inferior class for the river trade, but if destined for any other trade, where subject to the winds or the waves, that she was too rotten and worthless to be classed at all. The testimony of Seguin stands entirely uncontroverted as to every important, indeed every minute circumstance of inferiority, decay and unsoundness. It is attempted to be shewn by Gorham that one third of the important timbers being declared rotten is too large a portion, but the rottenness

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itself is not attempted to be denied, and the character of A. Gorham's proportional calculations do not, in point of fact, affect the question if admitted as true, but their propriety and probability will best appear by his testimony already referred to. The exhibition of Gorham's testimony by the plaintiff's counsel is followed with great felicity by a kind of algebraical calculation, as to the relation of the parties damaged to the whole, by which it would seem that the rotten parts only bore a proportion of about one seventieth or one ninetieth to the entirely of the materials composing the boat. With the same propriety, as regards the merits of this cause, might the gentlemen have occupied the time of this court in endeavoring to prove the relative magnitude of the soul to the grosser materials of the body. The plaintiff went into testimony in the court below to shew that the Vesuvius traded to Natchez in 1814 and 1815—and, that since the Natchez Steam Boat Company must have known her age, character, &c. But, was the Vesuvius represented to us as a boat of 1814 or 1815? No: she was a boat rebuilt, according to the representations of the plaintiff, and launched on the 1st January, 1817—this is shewn by all the testimony: and the plaintiff when exhibiting the engine room to the committee of the compa-

ny, and pointing out the strength of the timbers, dwelt upon the rebuilding, and illustrated the manner of its execution by what was in sight; and declaring the whole to have been done under his immediate eye and inspection.

Yet, strange to say, this was an old vessel repaired: her upper works new and of the fine and durable timber of Louisiana, while her keel and timbers most subject to exposure and decay, and most essential to the value and security of the boat, and wholly excluded from examination, were old and of the inferior timbers of Pittsburg.

It is certain, that the general belief was, that the Vesuvius was the finest boat on the river. The opinion proceeded from the idea that she had not been repaired simply, but rebuilt, and so rebuilt as to make her as good as new. Her appearance in the water did not conflict with this prevailing idea, but the plaintiff knew the contrary; and we now know it.

In marine architecture a distinction is taken between rebuilding and repairing: the giving a vessel a new keel, is that which seems necessary to constitute a rebuilding; for if the work be on the old keel, it is usually denominated a repairing. *Reev. law shipping*, 324—*Mallory b. 2, ch. 1, § 7*—*Law Mer. Am.* 98.

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This distinction is warranted by reason as well as authority, and the testimony shews that not only the keel but the futtocks and the most essential timbers of the hull were all old and rotten.

The fifth ground relied on by the defendant is, that there, being precedent conditions to be performed on the part of the plaintiff, he must not only aver but prove that he was ready and willing, and competent to perform all required of him by the contract.

This principle is well settled by the common law books, and has received the sanction of the supreme court of the United States.

At the time of delivering this boat the plaintiff was to make a conveyance vesting clear and perfect title to the company. So far from tendering this conveyance he has not shewn it was in his power to convey.

The counsel for the plaintiff meet this ground of defence by saying that the court can make the conveyance a condition of their decree. It is rather a novel doctrine that the court have the power to make out a case for the plaintiff, which he has not made out for himself.

The title papers of the plaintiff should have been exhibited, with a tender and conveyance such as he covenanted to make.

There is nothing before the court which would

enable them to say that it is in the power of the plaintiff to convey.

Can they with propriety decree that the plaintiff shall execute a conveyance vesting a clear and indisputable title, free of all liabilities and incumbrances, until he has clearly shewn himself not only willing, but competent, to make such conveyance?

The court would enforce this duty on the plaintiff before he could recover, from another well established rule of law, that multiplicity of action should not be encouraged. If the court was to decree in this case in favor of the plaintiff, and it should afterwards appear that he had no sufficient title, it would drive the company to another action.

But, again, the plaintiff has actually spread upon the record evidence shewing that he has long since abandoned the boat; nor is there any proof that, since the abandonment, he has reclaimed and put himself in a situation to deliver the boat, much less make a title to her.

In *Ramsay* vs. *Johnson*, Lord Kenyon says, the plaintiff must prove that he was prepared to tender and pay, if the defendant was ready to receive, and even this is a relaxation from a former but more rigid rule: and Wheaton fur-

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nishes a still stronger case. 4 *East*, 208—2 *Wheaton*, 290.

The sixth ground relied on by the defendant is, that this contract was not proved according to the laws of Louisiana, which were indispensable to recovery.

It was intimated by the court, that the question had been adjudicated in a former case. We have not been able to turn to the case to which the court alluded; and, as we do not know the extent of its application, any manifestation of confidence on our part, on this question, will not be imputed to any want of regard and deference to the intimation to which we allude.

The principles of the law of evidence, however unsettled in many respects or subjected to the fluctuations of opinion under various judicial systems, are under ours, on this subject, at least, regulated by positive law.

As the proof of this contract may be considered as applicable to the rules of evidence, as well as to the form of action or remedy enforcing it, and the operation of the *lex fori*, in this respect, has been strongly contended for by the plaintiff's counsel, to be consistent, they cannot object to our requiring proof of the execution of the contract, by our own laws.

As to acts under private signature, two modes

of proof are established. 1st. The acknowledgement of the party against whom it is advanced. *Civ. Code*, 306, *art.* 224. 2dly. By the signature of the party being proven by one witness who saw the obligation signed, or by two persons, skilled in hand writing, appointed by the judge for that purpose. *Civ. Code*, 306, *art.* 226.

The party charged is obliged formally to avow or disavow his signature. *Civ. Code*, 306, *art.* 225. If he avows his signature it amounts to full proof against him. *Civ. Code*, 314, *art.* 257.

If the party charged does not avow his signature, must it not be proven by him who claims the execution of the obligation? If he does deny, that is disavow it, there can be no question.

Is not a general denial, by a defendant, of all the facts set forth in the petition such a formal disavowal of his signature, to an act under private signature, as will put the plaintiff on the proof of it?

If it does not, then such general denial must be deemed an avowal of such signature, for it is certain the act must be established in some way, and if not established by the defendant's counsel, it must be proved.

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It cannot be contended that, in the absence of a formal disavowal, the act is to be considered as proven; *a fortiori* it cannot, if there be a denial however general.

The party could not even obtain a judgment by default, without proving the execution of this writing. Shall our rights be weakened by a denial of its execution?

The counsel for the plaintiff were well aware that this execution of the contract must be proved, or no recovery could be had; and great pains and labour were evinced to obtain the proof that was produced; and what does this proof amount to? Not to the proof required by our code, but only to the handwriting of the defendant and the witness.

And how is it that the counsel for the plaintiff obviate the difficulty? By telling us they have given the proof required by the principles of the common law. Our situation is truly a lamentable one, if this happy facility of calling in the common law is to render nugatory the express provisions of our own code, and this too after an admission by the plaintiff's counsel, that the laws of Louisiana were to govern in enforcing the remedy under the contract, and an ineffectual attempt to prove it according to these laws.

Previous to closing the defence it would be well to advert to the rules of interpretation, which will find the ready sanction of the court in the construction of the contract.

"In agreements, we must endeavour to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms." *Civ. Code*, 270, *art.* 56.

"In a doubtful case, the agreement is to be interpreted against him who has stipulated, and in favour of him who has contracted." *Civ. Code*, 270, *art.* 62.

Here the plaintiff has stipulated to deliver the boat in good order: if doubts arise as to what was meant by the use of this term, the writing must be construed against him who has stipulated.

The seller is obliged to explain clearly and distinctly which is the thing that is sold, and in what it consists, its qualities, defects, and every thing that may give occasion to any error, or misunderstanding, and if there is in his words any ambiguity, obscurity or other defect, they are to be interpreted against him. *Dom. b.* 1. *t.* 2. § 2. *a.* 14.

"We ought to examine what was the common intention of the contracting parties, rather than the grammatical sense of the terms. *Pothier, Obl. n.* 91."

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The translator of Pothier, in treating on the subject of interpretation of contracts, says, "as every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction." 2 *Pothier, n.* 5. Vide also 5 *chap. Shepherd Touchstone,* 1 *Fonblanque Equity, b.* 1, *c.* 6. *Powell on Contracts, head "Interpretation."*

By adverting to these and other modern authorities, it will be found, that in pursuance of this great and leading principle, "the intention of the parties," the courts of our own as well as other countries, as the science of jurisprudence has advanced, have unshackled themselves from the unjust restraints imposed by the earlier, but arbitrary rules of construction, as well in contracts as in treaties.

Martin, J. delivered the opinion of the court. Our attention in the decision of this cause is first claimed by several bills of exceptions.

1. The contract between the parties having been produced by the plaintiff's counsel sub-

scribed and sealed by the defendant, and attested by a subscribing witness, and proof made of the handwriting of both the defendant and witness; the latter being shewn to reside out of the state: the defendant's counsel objected to its being read, and the district court overruling this objection, a bill of exceptions was taken.

We are of opinion that the district court was correct. The witness being out of the jurisdiction of the state, his attendance in court could not be compelled, neither could it be before a commissioner. His testimony, thus affording the best evidence of the execution of the instrument, was not in the power of the plaintiff, who therefore was for this very reason dispensed from producing it. The defendant's signature, as it was not formally denied, was properly proven by a witness acquainted with his handwriting. *Clarke's ex'r's vs. Cochrane*, 3 *Martin*, 360.

2. The next bill of exceptions is to the opinion of the district court in ordering the reading of a report of certain individuals, appointed by the parties, offered by the plaintiff for the sole purpose of lessening the credit due to the deposition of one of these individuals, examined as a witness for the defendant.

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It appears to us that this report, although it was not sworn to, was properly admitted for the purpose of shewing a discrepancy between the statement to which the witness had sworn, and that in the report which he had attested by his signature. It is in every day's practice to prove declarations made by a witness contrary to what he swears: but the use of such evidence must always be restricted to what was the avowed object of the plaintiff, who offered it, viz. to lessen the credit of the witness.

3. The third bill was taken to the opinion of the court in sustaining an objection of the plaintiff's counsel to the following question put by the defendant to Commodore Patterson, a witness introduced by the former, for the purpose of establishing the soundness of the Vesuvius. "If you had contracted for the purchase of a steam boat, in all respects sound and in good order, and a boat had been tendered to you, under this contract, with one third of her important timbers, including her lower futtocks, rotten, would you deem such a boat answering the description in the contract, or being in all respects sound and in good order?"

We are not apprized, by any thing on the record, of the nature of the objection to which the district court judged this question liable, and

we believe it ought to have been answered; although it might perhaps, which we do not determine, have been modified, so as to answer the present, by limiting the supposed case to that of a steam boat in good order; instead of extending it, as was done, to that of a boat sound and in good order. As this bill, however, was taken by the defendant, and the most favorable answer could not avail him, the stipulation being for a boat in good order, and not for one sound and in good order, we think it useless to remand the case on this account.

4. A fourth bill was taken by the defendant's counsel on the refusal to swear Charles K. Lawrence, in chief; this gentleman having on his *voire dire* declared, that about the 24th of November, 1818, he purchased ten shares in the Natchez Steam Boat Company, and expected to pay his proportion of the price of the Vesuvius, if this court declared it to have been purchased by that company.

The interest which this witness has in the present action, was sufficient to repel him. But it was contended that he acquired it by his own act, after the contract now sued upon was entered into, and consequently that he could not, by so doing, deprive the defendant of the right which he had to his testimony. The record does not

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shew whether the fact, which he was called upon to establish, was anterior to his acquisition of the shares; although the circumstance of its date being particularly set forth, raises some presumption that such is the case. But the bill of exceptions is one of the defendant's, whose duty it was, if any particular circumstance entitled him to the testimony, notwithstanding the interest of the witness, to have made it clearly appear, in order to take the case out of the general rule. This we cannot presume, and are consequently bound to conclude that the district court correctly refused to swear the witness in chief, as the bill does not enable us to say that it erred. We do not, however, wish to be understood to determine, that a witness who has acquired an interest by his own act, since the party who offers him had a right to his testimony, may be sworn: a question which admits of considerable doubt. *Phillips on Evidence*, 99, 102.

5. The last bill is on the refusal to permit the defendant to offer in evidence what Samuel A. Bower, a witness introduced by him, had heard the clerk of the steam boat say. It is difficult to tell on what ground he could have been permitted to relate this. Hearsay is not evidence.

The plea in abatement appears to us to have

been correctly overruled. The defendant was personally bound by the contract. He is admitted by the pleadings to be a stockholder of the Natchez Steam Boat Company, and he subscribed the contract. According to the common law of England, which is shewn to prevail in the state of Mississippi, all the members of an unincorporated company are bound, as members of ordinary partnerships. *Watson*, 3. The contract is clearly shewn to have been entered into by the authorised agents of the company, acting within the powers delegated to them; and cases are cited in which a partner or agent, contracting under his own seal, as the defendant did in this case, becomes personally bound.

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The nature, validity and effects of this contract must be enquired into, according to the laws of the country, in which it was celebrated, even when the delivery of the thing, or the fact stipulated for, is to take place abroad. 1 *Gallison*, 375. Were we to test this case by the laws of this state, still the defendant would be found under a liability, as a member of the company, upon a contract entered into with his consent. But he shews that, in the state of Mississippi, his plea would prevail on the principle recognised in the case of *Rice* vs. *Shute*, viz. that a

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partner who is sued alone, may abate the suit, stating and naming his co-partners.

The law of this state must regulate us on this point. It is according to it that the remedy is sought for and to be administered. Here in cases of solidary obligations (which are the joint and several obligations of the common law, existing between partners) the creditor may sue either of his debtors alone, and is not bound, even on the plea of the latter, to bring all or any of the rest of the co-debtors in court. But it is contended that the act of the legislative council, 1805, 26, requires, that the petition should contain the names and residences of all the parties, and that the seventy and odd persons, named by the defendant in his answer, were parties to the contract, and their names not being in the petition, the suit must abate. The act, in our opinion, requires the insertion, in the petition, of the names and residence of parties to the suit alone, not of the the parties to the contract, on which the suit is grounded.

Partners cannot, by any clause in the partnership contract, alter the joint and several liability, which the law imposes on them, in favor of those with whom they contract. *Watson*, 172, 234.

We cannot admit that the act by which the

company was incorporated, being posterior to the contract, can affect the rights of the plaintiff.

On the merits, it is contended that the plaintiff ought not to recover, as he did not comply with his part of the contract by which he bound himself to deliver the boat in good order; as she had at the time her head beam broken, her boiler leaky, and a considerable part of her main timbers defective or rotten.

It is true her head beam, a considerable piece in the machinery of a steam boat, was broken and fished. But the plaintiff shews that this was by an accident which happened since the contract was entered into; that, as soon as he heard of it he ordered a new one to be made in New York, which was on the way at the time of the tender, was offered to be delivered on its arrival, has since arrived and has been put in the place of the broken one. If, however, the plaintiff did not shew any thing else, this circumstance would most likely be holden, as a justification on the part of the defendant in refusing the boat. But the plaintiff shews that the defendant was satisfied with the measures taken for procuring a new beam, and assured the plaintiff that if there were no other deficiency in the boat, this would be waived.

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Had the defendant wished to avail himself of the insufficiency of the head beam, he ought not to have thus waived his right to object thereto. For in such a case, the plaintiff might perhaps have procured another beam, out of some steam boat on the river. We therefore think that this objection cannot prevail.

It is further contended that the boiler was old and leaky. The age of it appears to be that of the boat, and the presumption is that the vendees could not well expect a newer one. The witnesses inform us that all boilers leak and lose some steam, and that this does not appear very deficient in this respect. But, it is alledged that it was worse than it appeared, because, before the examination, the plaintiff, in order to hide its defects, caused it to be covered with a thick coat of oil and lampblack. It is in evidence that this was done without any order from the plaintiff, that it is done at the end of every voyage, and even oftener, is necessary to guard the iron from the rust, and constitutes a part of what is called putting a boat in good order. Farther, it is in evidence that the vendees had a fair opportunity of viewing and examining the boiler before the contract.

A considerable number of pieces of timber, which at first appeared to this court as of mate-

rial importance, are shewn to be defective and rotten, but on a close examination of the testimony, and more mature reflection, they think these first impressions must yield to the depositions of carpenters, masters and owners of ships, examined on this head. These, almost unanimously assert, that notwithstanding the rottenness and defects of these pieces of timber, they consider the boat to be what is understood by a boat in good order. They make a distinction, to which the court has with great reluctance yielded, between a boat in good order and a sound one. They seem to allow the epithet of sound to ships on their first voyage only, and assert that afterwards every ship has some rotten and defective timber. Yielding, therefore, to the weight of the testimony in this respect, we are bound to say that the boat was in good order when she was tendered, if we except the absence of the new head beam, which the defendant did not complain of, and which would, he declared, make no difference: and this piece of machinery has since been supplied within the time mentioned. Further, it is in evidence, that the old head beam was in a condition to serve until the arrival of the new.

The contract of sale describes and ascertains

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the quality of the boat bargained for—a boat in good order: a worse could not have been tendered; a better cannot be insisted upon.

We leave out of view, as we are bound to do, all the conversations and correspondence of the parties before the contract. The conversations cannot affect the literal evidence. Every point started in the correspondence, if it does not appear in the contract, is abandoned and merged in the written agreement.

The defendant further urges that the plaintiff ought not to recover, because he has not proven, nor even alledged his capacity and readiness to make the conveyance stipulated for. We think this was unnecessary. He needed not to alledge his capacity, for his own title or conveyance was alone stipulated for. As to his readiness or his actual tender of the conveyance, the conduct of the defendant rendered an allegation or proof of these useless: for the defendant declared his unwillingness that the contract should be carried into effect, so that any further step on the part of the plaintiff was vain and useless. *Lex neminem cogit ad vana.*

It appears to us that the district court erred in making a deduction of $20,000, a sum greater

than that which it is proven would be required to repair the boat entirely, by substituting a new piece of timber to every decayed one. The boat was not sold as a new and perfectly sound one. According to the testimony, the vendees could not expect to find her without some decayed timbers. If the principle that a sound price implies a sound ware was to be understood, as the district court appears to understand it, no vessel could be sold for a sound price after her first voyage: for the witnesses depose that every vessel has some decayed timber after her first voyage.

The contract shews that the vendees were willing to give 65,000 for a boat which they must have known to have decayed timber in her. They stipulated that she should be delivered in good order, and this, on a close examination of the evidence and the best judgment we can form, means only in such a condition as to be fit to be employed immediately and during a reasonable time, without any repairs, and in this condition was the Vesuvius tendered by the plaintiff.

He is clearly, in our opinion, entitled to receive the price he stipulated for; and we deem ourselves bound to say, he is entitled to recover it from the defendant, not as chairman, as one

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of the directors, nor as agent of the company, but as a stockholder, a member of it. In unincorporated companies, like in all other partnerships, according to the law of the place where the contract was entered into and the domicil of the defendant, the members are jointly and severally liable: either of them may be coerced for the whole debt, an evil consequence which an act of incorporation can alone prevent, though it cannot remove it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to pronounce such a judgment, as in their opinion, ought to have been given in the district court, do order, adjudge and decree that the plaintiff do recover from the defendant the sum of sixty-five thousand dollars, to be discharged by the payment of fifteen thousand dollars with interest, at the rate of five per cent. a year from the inception of this suit, and the delivery of the notes of the Natchez Steam Boat Company for the sum of fifty thousand dollars in four instalments at three, six, nine and twelve months from the nineteenth of February last. But no execution shall issue till the plaintiff shall deliver to the vendees, or lodge

for them in the office of the clerk of the district court a conveyance of the steam boat Vesuvius, according to the terms of his contract: and it is ordered that the defendant pay costs in both courts.

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See same case, December term.

SPICER & AL. vs. *LEWIS & AL.*

APPEAL from the court of the first district.

If there be no suggestion of fraud or simulation, parol evidence cannot be admitted to shew that a deed of sale was intended only as a collateral security.

MATTHEWS, J. delivered the opinion of the court. This case comes up in a bill of exceptions to the opinion of the district court in refusing to admit a witness, and an account current, to prove that an act of sale of the Barilla, (concerning which vessel the present suit is brought) was not intended, as it purports, to convey an absolute property in her to the vendees, but, that the transfer was intended as a collateral security only.

The pleadings do not alledge fraud on the part of any person concerned in this suit, nor is there any allegation of simulation in the contract. We are, therefore, of opinion that the district court was correct, and as there is no

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statement of facts, nor any thing equivalent on which this court might decide the case on its merits,

It is ordered, adjudged and decreed that the appeal be dismissed at the appellant's costs.

Morse for the plaintiffs, *Duncan* for the defendants.